January 2012

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ADMINISTRATIVE LAW JUDGE ORDERS

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COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

January 18, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2011-625-M
v.	:	A.C. No. 20-03081-241408
MOOSE LAKE AGGREGATES, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY: Duffy, Young, Cohen, and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On May 2, 2011, the Commission received from Moose Lake Aggregates, LLC ("Moose") a motion made by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Moose's president, Kenneth Smith, asserts that his administrative assistant routinely paid proposed assessments without his specific knowledge. Moose states that it had never contested citations, and always paid them routinely. In addition, Moose states it was unaware that section 104(d) citations were of a more serious nature and could potentially trigger prosecutions under section 110(c). Moreover, Moose asserts that unless the requested relief is granted, the mine could be placed under MSHA's 'excessive history of violations' scheme.

The Secretary opposes the request to reopen and notes that the routine payment of assessments is insufficient to justify reopening. The Secretary contends that the operator's procedures for processing proposed assessments were inadequate because there was no procedure for reliably determining whether the operator wished to contest the proposed assessment. In addition, the Secretary states that ignorance of the law is not a basis for reopening under Rule 60(b).[1] Moreover, the Secretary asserts that the prospect of significant consequences, such as an excessive history of violations, militates against reopening since it calls for increased care in properly processing proposed assessments.

On September 28, 2011, the Commission sent Moose a letter asking it to explain why it failed to timely contest the proposed assessment, why it filed its request to reopen more than 30 days after discovering that the assessment was not timely contested, and what office procedures were implemented to prevent such failure in the future. In response, Moose asserts that the proposed assessment arrived at the offices of Kenneth Smith, Inc., a distinct business from Moose. The administrative staff at Kenneth Smith, Inc. was instructed to pay all invoices as they arrive, and was not aware of the proper manner in which to contest MSHA citations. Moose's president, Kenneth Smith, instructed his employees to contest future proposed assessments and, from then on, send all MSHA invoices directly to him.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011). In this case, we conclude that the lack of any procedure to determine whether the proposed assessment should be contested represents an inadequate or unreliable internal processing system. *Sloss Indus., Corp. v. Eurisol*, 488 F.3d 922, 935-36 (11th Cir. 2007); *Gibbs v. Air Canada*, 810 F. 2d 1529, 1537 (11th Cir. 1987). We also note that it is the operator's responsibility to make sure that its employees receiving mail at its address of record are properly instructed regarding the significance and correct processing of MSHA correspondence.

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[1] We note that since the Secretary assured the operator she will not argue that the operator's failure to contest the proposed assessment estops its agents from litigating any aspect of the underlying violation if a subsequent section 110(c) proceeding is initiated, we do not find it relevant for our consideration.

Moreover, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between the date the proposed assessment became a final order of the Commission and the operator's filing of its motion to reopen. *See*, *e.g., Left Fork Mining Co.*, 31 FMSHRC 8,11 (Jan. 2009); *Highland Mining Co.*, 31 FMSHRC 1313, 1316 (Nov. 2009). Here, the operator asserts that the proposed assessment became a final order of the Commission on January 19, 2011, but fails to provide an explanation for filing its motion to reopen more than three months later, on April 29, 2011. Furthermore, the operator's second motion to reopen the remaining citations in proposed assessment. No. 000241408 was filed almost eleven months later, on December 7, 2011.

Having reviewed Moose's requests and the Secretary's response, we conclude that Moose has failed to establish good cause for reopening the proposed penalty assessment, and deny its motions with prejudice.

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Chairman Jordan, concurring and dissenting:

The proposed penalty assessment for Citation No. 6504472 was not received at the mine. Rather, it arrived at the offices of Kenneth Smith, Inc. Kenneth Smith is the president of Moose Lake Aggregates, LLC, but Kenneth Smith, Inc. is a separate corporate entity.

The administrative staff at Kenneth Smith, Inc. had previously been instructed to immediately pay all bills. The affidavit of Trudy Petersen states that she thought the proposed penalty assessment was a bill, and she paid it pursuant to these instructions. In my view, this constitutes a mistake which, under Rule 60(b), should serve as a basis to reopen this final order. *See Kaiser Cement Corp*., 23 FMSHRC 374 (Apr. 2001) (granting request to reopen a penalty assessment when the operator inadvertently paid two proposed penalties, and citing cases). Moreover, as my colleagues acknowledge, the operator states in its revised motion to reopen that now all MSHA invoices are sent directly to Kenneth Smith "in an effort to avoid a future administrative mistake resulting in a missed filing deadline."

In light of the above, I would grant relief and reopen this final order. However, I agree with my colleagues that the operator's second motion to reopen the remaining citations, which was filed almost eleven months after it became a final order, should be denied.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

Distribution:

Adele L. Abrams, Esq.
Law Office of Adele L. Abrams, P.C.
4740 Corridor Place, Suite D
Beltsville, MD 20705

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 18, 2012

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. VA 2011-579
ADMINISTRATION (MSHA)	:	A.C. No. 44-07251-247562
	:	
v.	:	Docket No. KENT 2011-1310
	:	A.C. No. 15-18241-247495
BRESEE TRUCKING CO., INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 28, 2011, the Commission received from Bresee Trucking Co., Inc. ("Bresee") two motions seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).[1]

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable

[1] Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers VA 2011-579 and KENT 2011-1310, both captioned *Bresee Trucking Co., Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

The record indicates that the proposed assessments were delivered on March 28, 2011, and became final orders of the Commission on April 27, 2011. Bresee asserts that it was not aware of the proposed assessments until after the 30 day time limit to contest had expired. Bresee states that the proposed assessments were mailed to "Rd # 708 Seminary," while Bresee's address of record is "P.O. Box 560."

The Secretary opposes the requests to reopen and notes that MSHA's assessment center, Wilkes-Barre, PA, received specific mailing instructions from Bresee on October 29, 2008, to use the "Rd # 708 Seminary" address. The Secretary provided a copy of these mailing instructions. The Secretary states that the proposed assessments were mailed to "Rd # 708 Seminary" by FedEx on February 25, 2011, and were returned undelivered. The proposed assessments were mailed again to the same address by the U.S. Postal Service, certified mail, and were signed for by Hillis Bresee on March 28, 2011. Moreover, the Secretary asserts that this same address has been used by MSHA for mailing all proposed assessments since 2008, and Bresee has been receiving, and contesting, these proposed assessments. Therefore, the Secretary states that the operator has failed to adequately explain why the proposed assessments should not be considered to have been properly served.

On September 28, 2011, the Commission sent Bresee a letter asking it to identify how and when it discovered that the penalties were not timely contested, what office procedures were implemented to prevent such failure in the future, and respond to the Secretary's assertions regarding Bresee's address of record. In response, Bresee asserts that it maintains a mailbox at the local post office and has also publicized a physical address, which has no mailbox, for special delivery services, such as FedEx. Bresee further states that these proposed assessments were actually delivered to another mailbox, not assigned to Bresee.

The Commission has made it clear that where a failure to contest a proposed assessment results from an inadequate or unreliable internal processing system, the operator has not established grounds for reopening the assessment. *Pinnacle Mining Co*., 30 FMSHRC 1061, 1062 (Dec. 2008); *Pinnacle Mining Co*., 30 FMSHRC 1066, 1067 (Dec. 2008); *Highland Mining Co.*, 31 FMSHRC 1313, 1315 (Nov. 2009); *Double Bonus Coal Co.*, 32 FMSHRC 1155, 1156 (Sept. 2010); *Oak Grove Res., LLC*, 33 FMSHRC 103, 104 (Feb. 2011). It is the operator's responsibility to maintain an accurate address of record with MSHA, and notify MSHA within 30 days of any changes to its information. 30 C.F.R. §§ 41.10, 41.12. In this case, the address provided by the operator in 2008, which it now claims to be only for FedEx deliveries, returned mail as undelivered by FedEx. At the same time, Bresee's owner has been signing for U.S. Postal Service mail at this same address, which it now claims has no mailbox. We conclude that the operator's lack of procedure to follow up on received mail and determine whether and when proposed assessments should be contested represents an inadequate or unreliable internal

processing system. *Sloss Indus., Corp. v. Eurisol*, 488 F.3d 922, 935-36 (11th Cir. 2007); *Gibbs v. Air Canada*, 810 F. 2d 1529, 1537 (11th Cir. 1987). We also note that this type of failure appears to be part of a pattern for Bresee, as shown by its previous motions to reopen five penalty assessments which had become final orders of the Commission due to unsuccessful delivery attempts, where the Secretary and the Commission urged Bresee to keep MSHA informed of its address of record. *Bresee Trucking Co., Inc.,* 31 FMSHRC 804, 805 (Jul. 2009).

Having reviewed Bresee's requests and the Secretary's responses, we conclude that Bresee has failed to establish good cause for reopening the proposed penalty assessments, and deny its motions with prejudice.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Michael D. Clements
Representative
408 A Manor Drive
Kingsport, TN 37660

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

January 20, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2010-18
v.	:	A.C. No. 15-19206-196010
JAMES RIVER COAL SERVICE COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 12, 2011, the Commission received from James River Coal Service Company ("James River") a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On March 15, 2011, Chief Judge Lesnick issued an Order to Show Cause and Order of Default in response to James River's failure to answer the Secretary's November 17, 2009 Petition for Assessment of Civil Penalty. The judge ordered the operator to file its answer within 30 days or it would be in default. The Commission did not receive James River's answer within 30 days, so the order of default became effective on April 15, 2011.

James River asserts that it never received the Secretary's Petition for Assessment. The Secretary does not oppose the request to reopen and notes that MSHA's records contain an answer to the Penalty Petition filed on December 4, 2009. However, the answer does not indicate that it was also sent to the Commission, as instructed in the penalty petition.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the judge's order here has become a final decision of the Commission.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed James River's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Order of Default. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Melanie J. Kilpatrick, Esq.
Rajkovich, Williams, Kilpatrick & True, PLLC
3151 Beaumont Centre Circle
Suite 375
Lexington, KY 40513

Thomas A. Grooms, Esq.
Office of the Solicitor
U.S. Department of Labor
211 7th Avenue North, Suite 420
Nashville, TN 37219

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 20, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2009-564-M
v.	:	A.C. No. 01-03132-184779
NORTH MONTGOMERY MATERIALS, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 15, 2011, the Commission received from North Montgomery Materials, LLC ("North Montgomery") a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On December 7, 2010, Chief Judge Lesnick issued an Order to Show Cause and Order of Default in response to North Montgomery's failure to answer the Secretary's July 9, 2009 Petition for Assessment of Civil Penalty. The judge ordered the operator to file its answer within 30 days or it would be in default. The Commission did not receive North Montgomery's answer within 30 days, so the order of default became effective on January 7, 2011.

North Montgomery asserts that it submitted a timely answer to the Secretary's Petition for Assessment and did not receive the Order to Show Cause. The Secretary does not oppose the request to reopen and notes that the Atlanta Regional Solicitor's Office indicated that the operator's answer was timely received by the MSHA Birmingham District Office on July 16, 2009. However, the answer does not indicate that it was also sent to the Commission, as instructed in the penalty petition.

The judge's jurisdiction in this matter terminated when the default occurred. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Consequently, the judge's order here has become a final decision of the Commission.

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed North Montgomery's request and the Secretary's response, in the interest of justice, we hereby reopen the proceeding and vacate the Order of Default. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Brad H. O'Dell, Owner
North Montgomery Materials, LLC
P.O. Box 469
Millbrook, AL 36054
HARDROCKHILL2@AOL.COM

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 20, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2010-444-M
v.	:	A.C. No. 04-04932-204359
GEORGE REED, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 21, 2011, the Commission received from George Reed, Inc. ("Reed") a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On March 21, 2011, Chief Judge Lesnick issued an Order to Show Cause which by its terms became an Order of Default if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Reed's failure to answer the Secretary's February 19, 2010 Petition for Assessment of Civil Penalty.

Reed asserts that it filed a timely response to the Show Cause Order, and provides a certified mail receipt signed by the Docket Office on April 22, 2011. The Secretary does not oppose the request to reopen, but notes that the penalty petition was mailed to the address of record but returned unclaimed.

Having reviewed Reed's request and the Secretary's response, in the interest of justice, we conclude that Reed was not in default under the terms of the Show Cause Order, as it timely complied with the Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Gregory Reed, General Mngr.
George Reed Inc.
P.O. Box 4760
Modesto, CA 95352

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

January 24, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. YORK 2010-228-M
v.	:	A.C. No. 06-00274-215780
ADELMAN SAND & GRAVEL, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 9, 2011, the Commission received from Adelman Sand & Gravel, Inc. ("Adelman") a motion seeking to reopen a penalty assessment proceeding and relieve it from the order of default entered against it.

On March 16, 2011, Chief Judge Lesnick issued an Order to Show Cause which by its terms became an Order of Default if the operator did not file an answer within 30 days. This Order to Show Cause was issued in response to Adelman's failure to answer the Secretary's June 7, 2010 Petition for Assessment of Civil Penalty.

Adelman asserts that it filed a timely response to the Show Cause Order, and provides a certified mail receipt signed by the Docket Office on March 30, 2011. The Secretary does not oppose the request to reopen, but notes that there is no record that MSHA received a copy of the answer.

Having reviewed Adelman's request and the Secretary's response, in the interest of justice, we conclude that Adelman was not in default under the terms of the Show Cause Order, as it timely complied with the Order. Accordingly, this case is remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Seymour Adelman
Adelman Sand & Gravel, Inc.
34 Bozrah St.
Bozrah, CT 06334

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 31, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2011-1242-M
v.	:	A.C. No. 41-03140-254737
STARR AGGREGATES, LLC	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 20, 2011, the Commission received from Starr Aggregates, LLC ("Starr") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary does not oppose the request to reopen.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Starr's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Melba Guerra-Reynolds
Starr Aggregates, LLC
P.O. Box 303
Grulla, TX 78548

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 31, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2011-1530-M
v.	:	A.C. No. 26-01962-255871
LAYNE CHRISTENSEN COMPANY OF DELAWARE CORPORATION	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On September 27, 2011, the Commission received from Layne Christensen Company of Delaware Corporation ("Layne") a motion submitted by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary does not oppose the request to reopen.

Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.,* 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause

for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.,* 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed Layne's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/ Michael F. Duffy
Michael F. Duffy, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
Patrick K. Nakamura, Commissioner

Distribution:

Charles P. Keller, Esq.
Snell & Wilmer, LLP
One Arizona Center
400 East Van Buren Street
Phoenix, AZ 85004-2202

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N. W., Suite 9500
Washington, D.C. 20001-2021

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021
Telephone No.: 202-434-9933
Telecopier No.: 202-434-9949

January 3, 2012

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. SE 2011-477-R
	:	Citation No. 8519555;04/26/2011
	:	
	:	Docket No. SE 2011-478-R
	:	Citation No. 8519556;04/26/2011
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine No. 7
Respondent	:	Mine ID 01-01401
	:	
	:	

DECISION

Appearances: David Smith, Esq., Maynard Cooper & Gale, PC, Birmingham, Alabama for the Contestant
Uche N. Egemonye, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia for the Respondent.

Before: Judge Moran

In this proceeding under the Mine Act, Contestant Jim Walter Resources, Inc. ("JWR") maintains that Order Nos. 8519555, 8519555-01, and 8519555-02 should be vacated on the grounds that they were "unlawful, unconstitutional, and products of MSHA's abuse of discretion." JWR Brief at 1.[1] For the reasons which follow, JWR's various claims are rejected and its Contests in these matters are DISMISSED.

It is JWR's assertion that "the Secretary's orally and remotely issued § 103(j) order and its subsequent automatic modification into a § 103(k) order were unlawful under the Mine Act." *Id.* at 1. JWR contends that (j) orders "can only be issued when rescue and recovery work is necessary, and [neither was present] in this case." *Id.* JWR describes MSHA's practice of "*blindly issuing* a (j) order [which is then] automatically modified into a (k) order upon the

[1] JWR's post-hearing brief is entitled "Contestant's proposed finding (sic) of facts and conclusions of law. For ease of reference it is referred to as "JWR Brief."

inspector's arrival at the mine" to be without any "statutory basis" and it characterizes MSHA's action as a "*surreptitiously adopted protocol*." *Id*. at 2 (emphasis added).

One might think, given the tenor of JWR's initial contentions, that there would be no alternative stance but that is not the case. JWR's second position is that, if MSHA's actions could be viewed as its interpretations of the Mine Act, such interpretations would not be entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), ("*Chevron"*), because those interpretations arose as "procedures set forth in mere policy letters, [and such letters] lack the force of law." Then, as a back up to its back up position, JWR adds that, even if the policy letters were eligible for *Chevron* deference, one cannot move to the deference issue because the "unambiguous language of §§ 103(j) and (k)" state Congress' express intent. *Id.* at 2. Thus, by asserting that the plain language of those sections precludes any "deference" step, JWR circles back to its initial argument.

JWR has other issues with MSHA's action here because it contends that the "Secretary's modification of the (j) order to a (k) order while a previously issued (k) [order] was still in place on the same area of the mine violated JWR's procedural due process rights." JWR's theory is that MSHA should have modified the first, already existing, (k) order and not modified the (j) order to new (k) order. By doing this, JWR claims MSHA "denied JWR its statutorily granted right to challenge the scope of the second (k) [order]." *Id.*

Last, JWR asserts that MSHA's actions were "arbitrary and capricious" and, as such, an abuse of agency discretion. JWR says that is so because MSHA made no "rational connection between the facts of the accident and the *drastic* action it took against JWR." *Id.* (emphasis added). Such "*drastic action*," as JWR characterizes it, produced an order "whose scope and impact on the mine was *grossly disproportionate* to the scope of the problem." *Id.* (emphasis added).

Statutory provisions involved in this proceeding

The full text of the sections of the Mine Act involved in this Contest provide as follows:

Section 103 (j) Accident notification; rescue and recovery activities

In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. For purposes of the preceding sentence, the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he

deems it appropriate, supervise and direct the rescue and recovery activities in such mine. 30 U.S.C. § 813(j).

Section 103 (k) Safety orders; recovery plans

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal. 30 U.S.C. § 813(k).

Findings of Fact

The Sequence of events:

Mr. Jacky Shubert is presently a MSHA field office supervisor, a position he has held for the past 3 years.[2] In charge of nine employees, he directs the work force out of MSHA's Bessemer field office. On March 25, 2011, Supervisor Shubert issued the (j) order, which is part of the subject of this Contest, at JWR's Number 7 mine. Tr. 17. Shubert's experience with the Number 7 mine is extensive. Tr. 18. Regarding the event in question, Shubert was contacted on March 25, 2011, receiving a phone call from Keith Plylar, who is the safety supervisor at the Number 7. Plylar told Shubert that there had been an ignition on the "Number 4 outby the face area [while they were] doing some burning and welding." [3] Tr. 35. In reaction to that information, Shubert issued, verbally, to Plylar, a section 103 (j) order. Having issued that (j) order, the conversation with Plylar ended. Tr. 18.

[2] Before his supervisory position, then inspector Shubert was a ventilation specialist and he has nearly 25 years of employment with MSHA. This included 10 years' experience as a coal mine inspector. Tr. 15-16.

[3] Shubert stated that in the past 15 months, he had personally issued approximately ten or so (j) orders for this mine. Shubert related that customarily when he has issued a (j) order to Plylar, he would state that he was issuing a (j) order on whatever section was applicable or wherever the accident occurred. Tr. 177. And Plylar would normally respond that he knew the rest. Tr. 177. In the past, when issuing such (j) orders to Plylar, Shubert stated that Plylar never took such an order as having the effect of shutting down the entire mine. Tr. 177. Nor, in this instance, when Shubert issued the (j) order in litigation in this proceeding, did that (j) order shut down the entire mine. Tr. 177. Further, when such (j) orders have been issued, mines have in some instances inquired for clarification by asking for example if the order would shut down a section of a belt or the entire belt. Tr. 178. Plylar asked no such questions of clarification in this instance. Tr. 178.

Shubert then contacted MSHA inspector Joe Turner, directing him to go to the mine and investigate the matter. Tr. 18-19. Shubert advised that this (j) order was not the first he had issued to this mine, as he had issued about 25 such (j) orders in the last two years. Tr. 19. The majority, that is "probably 99 percent" of those (j) orders pertained to ignitions. Tr. 19. Government Exhibit 1 ("GX R 1") is the written memorialization of Shubert's orally issued (j) order, as issued later the same day, by Inspector Turner. Thus Turner reduced the oral (j) order from Shubert to writing. Tr. 20. Shubert explained that the ignition involved here was created by sparks from burning and welding activity. However, it should be realized that such sparks, by themselves, do not cause an ignition as there must be methane present too. Thus, the recipe involves both a spark and methane for an ignition to occur. Tr. 21.

Added to that is the admitted fact that the Number 7 mine is one of the gassiest mines in the United States and it is the gassiest mine in all of MSHA's District 11. In fact, the mine liberates some 20 million cubic feet of methane every 24 hours.[4] Tr. 21. Underscoring the gravity of the inherent conditions at this mine, the Number 7 is under a "five-day spot" inspection. Any mine that liberates more than a million cubic feet of methane in 24 hours is under such a five-day spot inspection. Tr. 21. Thus, every day the Number 7 liberates twenty times the amount of methane needed for the five-day spot inspection requirement. Further, the face has to be checked every 20 minutes for methane. Tr. 22.

In terms of "ignitions" Shubert stated that the Number 7 Mine had approximately 23 in the past 15 months. Tr. 23. Shubert then spoke to the "accident/injury report" that is within MSHA's data base. The report, GX R 2, and referred to as a "7001," is filled out by a mine operator whenever there is an accident, or injury or illness. Information from the report comes directly from the mine making the report.[5] Thus, the words employed in the 7001 are unfiltered. They are taken from *the mine's own reports* to MSHA. Tr. 29. These reports are part of

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[4] As JWR witness Ty Olson, the underground manager at the east quarry for the Number 7 mine, would later testify, he essentially agreed with that estimate, acknowledging that the Number 7 mine liberates "in the neighborhood of 17 million cubic feet per day of methane." Tr. 342.

[5] Shubert, stated that each item on the left side of GX R 2 represents a separate event. Tr. 57. For example, in that report, the first line refers to an ignition when a continuous miner was cutting coal. Tr. 24. During cross-examination, JWR pointed out that, for GX R 2, Shubert "controlled" the data he sought in the printout. Importantly, there was no contention that the data in that exhibit was false, just that Shubert put limits as to the scope of the data he was seeking. However, the fact that limits were used in the parameters of the data being sought does not dilute what the document undeniably shows: some 23 ignitions occurred at the Number 7 mine in a 15 month period. Further, an "encyclopedic sized" retrieval of data, of the sort suggested by JWR as more informative, would not have added pertinent information, but rather would only serve to distract the focus from the subject being probed: the number of ignitions at this mine.

MSHA's regularly kept business reports. For this report, Shubert related that every one of the ignitions listed in it involved a spark contact with methane. Tr. 26.

By statutory definition under the Mine Act, an "accident" includes a "mine ignition." There is no dispute that a mine ignition occurred here.[6] Though it sounds friendlier and more genteel, when, during the hearing, the witnesses or counsel referred to the "accident" at the Number 7, which generated this litigation, that term was used as a synonym for the "ignition" which occurred on March 25, 2011.[7] *See*, Tr. 16-17.

Affirming his earlier testimony, when Shubert issued the (j) order, he told Mr. Plylar that a (j) order was being issued. Plylar responded that he was aware of that. Shubert then explained the purpose of utilizing a (j) order.

> [W]hen an accident occur[s] at any coal mine[ ], . . . [MSHA] will preferably issue a (j) order, not knowing of the output of what's going on at the mines, to preserve the evidence. And not knowing if the fire's out or if they need any assistance at the mines until the inspector arrives and he will make that decision.

Tr. 34.

The (j) order itself is consistent with Shubert's statement. It provided:

> An ignition has occurred on the no. 4 section (MMU-004) outby the last open crosscut where welding was being performed. This 103(j) order is issued to protect the health and safety of the miners and to protect any evidence that would be pertinent to the ignition investigation. This order also prohibits all activity inby the feeder on the no. 4 section (MMU-004). This order was initially issued orally and has now been reduced to writing.

Order No. 8519555

According to Shubert, when he is informed that there has been an ignition, he recognizes that such an event could have caused an explosion and that it could still be burning. For that reason, MSHA issues a (j) to preserve the evidence at that time. Tr. 35. As to whether Plylar

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[6] An "ignition" is one of 12 such items listed under "accidents," and this is set forth in 30 CFR Part 50-2. Number 5 among those "dirty dozen," as MSHA calls the 12 items, is an ignition of methane gas and dust. Tr. 37.

[7] Shubert identified GX R 3 as the 7001 submitted by JWR after the March 25th ignition, which is the ignition in issue in this case. Tr. 31.

advised whether the flame from the ignition was out, Shubert initially could not recall, but then stated that Plylar did not so advise. Tr. 125. Shubert did acknowledge that in the majority of such calls, MSHA is told that the fire has been extinguished. Tr. 125. In the Court's view, this is beside the point. First, what occurs in the majority of such past cases does not instruct the agency as to the proper course to be taken when a new ignition is reported. Second, and of greater importance, calls, such as the ignition report here, are relaying information. They are not being transmitted by one with firsthand knowledge. Plylar was relaying *what someone else told him*. Therefore, given the gravity that may be associated whenever an ignition occurs, it is prudent for MSHA to take steps to place all matters on hold until it has an inspector on the scene to personally observe, firsthand, the situation at the mine.

Shubert also informed that, confronted with such information, this is MSHA's only tool. That is, there is not some other order available at its disposal when faced with the report of an accident. There are no alternative orders to invoke. Tr. 35-36. Shubert reconfirmed this later: MSHA has no other tool other than to issue a (j) order when a call comes in advising of an ignition. Tr. 171-172. The Court finds this to be the fact. Significantly, in the context of the Agency's mission of protecting miner safety and health, Shubert advised that if he had done nothing the mine would've been able to continue to mine with no new restrictions added, despite having had an ignition. Tr. 172. This state of affairs, that is, the issuance of a (j) order, may change, but not until the inspector actually arrives at the mine. At such time, the Inspector will reduce the (j) order to writing and then may issue a (k) order or any other order the inspector deems to be appropriate, either to preserve the area or conduct his investigation. Tr. 36.

The Court inquired of Shubert as to why it is necessary to orally issue a (j) order immediately at the time it learns of an ignition. Inspector Shubert stated that this was done to "cease any operations, to stop any work so [MSHA] can go down and investigate and to - - that's for the company to preserve all the evidence that they have." Tr. 37. By issuing it verbally, that verbal instruction ceases operations immediately, or at least that is the intention by its issuance. Tr. 37. This is true whether the mine is mining coal or, as happened here, working by doing burning and welding. Tr. 37-38. It is also designed to address any risk of tampering with evidence. Tr. 38.

To place MSHA's conduct in context here, it is important to note that Supervisor Shubert called Inspector Turner *immediately* after the phone call from Plylar. Tr. 40. In that call to Turner, Shubert advised him that he had issued a verbal (j) order, and that the mine had an ignition.[8] Tr. 49. He did not tell Turner that the mine was already under a (k) order, though

[8] On cross-examination by JWR, an attempt was made to show that Shubert's testimony was inconsistent with his deposition. While there were some inconsistencies between statements Shubert made during his deposition and statements he made at the hearing, the court assessed the credibility of Inspector Shubert's explanation at the hearing and found it to be trustworthy. In short, Shubert repeatedly explained that many of the inconsistencies were based upon his

(continued...)

[8](...continued)
assertion that his testimony in his deposition was including information he learned *after* the ignition but *before* his deposition. Thus, his responses were impacted by what he learned subsequent to the ignition event. As an example, although JWR points to Shubert's earlier deposition statement that he *did* know that the flame was out and that the event was over, Shubert explained that all his deposition testimony was based on what he learned *after the fact*. Tr. 128 - 130. Per the transcript at page 44, family health issues, the Court finds, could also explain some inconsistent remarks Shubert made during his deposition, but the more important point is that none of the various areas JWR Counsel delved into during Shubert's deposition have any impact upon the issues before the Court. As just noted, Shubert, the Court finds, was a credible witness. Further, much of the cross-examination involved purely tangential matters, such as whether Shubert received the call about the ignition from MSHA's "800" number or from his home. Several other aspects of the cross-examination dealt with non-issues, such as Shubert's agreement that MSHA has provided inspectors with a "cheat sheet" to assist inspectors with what to write down when reducing the verbal (j) order to writing. Tr. 48. Such matters have no relevance to the matter before the Court: the legitimacy of MSHA's issuance of the (j) order to JWR on March 25, 2011. Shubert agreed that after his call to JWR, his job was done. Tr. 47. Despite its many attempts to point out inconsistencies, JWR counsel later objected to the government's questions upon redirect, which addressed the apparent inconsistencies between Shubert's deposition and his testimony at the hearing. The Court did not buy into JWR's objections. The key is that Shubert stated that he had no knowledge of what was actually happening at the mine at the time JWR's Plylar called him. Tr. 187. This is undisputed, as Shubert was not at the mine. Responding once again to his apparent inconsistency between his deposition statement and his statements at the hearing, Shubert repeated that his deposition answers were based upon what he learned *after the fact,* that is, they were not reflecting what he knew when Plylar first made the call to him. This observation, while it escapes JWR, only makes sense, as *not even Plylar knew the details* of the circumstances surrounding the ignition, as he was not a firsthand observer either. Plylar was only echoing what *he was told by another JWR employee*. Tr. 189. While JWR tried to expand Shubert's testimony concerning his conversation into a three act play, the fact is that the conversation between the two lasted only a minute or less. Tr. 192. Shubert also affirmed that the first word he received about the event came from Plylar, not from an 800 number call in advance of Plylar's call. Tr. 192-194. This was Shubert's position, even if he stated something different in his deposition and the Court finds Shubert to have presented a credible explanation and answer on this issue.

Since JWR dwelled on the issue so much, the Court inquired about its theory, that somehow it really mattered in this case whether Mr. Shubert got the initial call from the 800 number or from Mr. Plylar. Tr. 197. It is JWR's position that MSHA had the escalation report and that the report informed it that there was a brief ignition, that the fire had been extinguished, that no one had died, and no injuries occurred, and no one was trapped. Tr. 197. From this, JWR is contending that Shubert knew exactly what the situation was and yet he issued his (j)
(continued...)

Shubert knew that was the case.[9] In this regard Shubert stated that the mine had an ignition in the face area a couple of days before the ignition involved here. Shubert expressed that his intention with the (j) order in issue in this case was to freeze mine activity outby the feeder or at the feeder where the [continuous] "miner," that is, where the continuous miner machine they were working on, was located. Tr. 49. As the "continuous miner" was at the feeder location, the ignition occurrence was not a face ignition. Consequently, the face area was not shut down by the (j) order at issue in this case. Tr. 50.

In any event Shubert agreed that the data from Ex. R 2 (i.e. the 7001 accident/injury report) was considered by MSHA *but not before* the issuance of the (j) order. Rather, it was considered later when the (k) order was issued, supplanting the (j) order.[10] Tr. 55. Shubert

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[8](...continued)
order anyway. Tr. 198. A*ssuming only for the moment,* that JWR's version is accurate, the Court concludes that it could still be quite reasonable for MSHA to decide that a (j) still needs to be issued until the Agency gets feet on the ground by having an inspector *present, right at the mine site.* As the Court stated regarding this contention, "the agency has to act prudently" in these situations, and consequently, at the end of the day it really doesn't matter which call came first. Tr. 199, 202. For the record, however, the Court wants to make clear that it found Shubert's testimony at the hearing and his explanation for inconsistencies, to be credible.

[9] JWR moved to have its Exhibit 23, the "Escalation Report," admitted into the record. Tr. 203-204. Supervisor Shubert agreed that the Exhibit is the report his office received before he issued his (j) order but all it shows is that the Agency received a 1- 800 call from Mr. Plylar. Tr.205. More importantly, as Supervisor Shubert made clear, *the facts* in the escalation report were *not* submitted to MSHA *before* the (j) order was issued. Tr. 205. As Shubert explained the process, an individual at MSHA types the report and if a call comes in at a given time, it may be 20 minutes before people such as himself receive the report. Accordingly, Shubert reaffirmed that the first time *he* learned of the ignition was upon receiving the call from Plylar. Tr. 206. Thus, he stated, and the Court finds, that when he received that call from Plylar, Supervisor Shubert did *not* have the escalation report in front of him. Tr. 206. More importantly, the Court notes that, even if it were to assume JWR's version of the events, that is, that Shubert had the Escalation Report when he received the call from Plylar, it would not matter in terms of assessing the appropriateness of the issuance of the (j) order. Tr. 207. The reason for this is plain. Faced with a report of an ignition, MSHA has the statutory leeway to issue a (j) Order immediately which order remains in place until it is able to have an inspector view the situation at the mine firsthand. It does not take much to imagine the rain of criticism that would fall upon the Agency were it to do nothing and impose no (j) order in the face of the report of an ignition, were a second, entirely preventable, ignition then to occur. Ignitions, by their nature, demand a serious and prompt reaction from MSHA.

[10] Accordingly, speaking to the third page of GX 1, Shubert agreed that reflects the modification which occurred on March 25, 2011 and that GX 2, with its list of ignitions at the
(continued...)

agreed that MSHA maintains "event files" for each of those listed events. Tr. 58. If he had looked at each of those event files, he would have seen that there was an existing (k) order on the Number 4 section. However, that existing (k) order was "in the face area." In contrast, the (k) order in this litigation was issued for *the outby area*. Tr. 58. Shubert acknowledged that he did not review *the particulars* of those listed ignitions. Tr. 60.

Shubert stated that he did talk with Inspector Turner later the same day, that is, after he initially sent Turner to the mine.[11] Despite the fact that Supervisor Shubert did not issue the (k) Order in this case, JWR still made efforts to ask him about its issuance. Tr. 120. In this regard, Shubert denied that he told inspector Turner that he was to change the (j) order to a (k) upon his arrival at the mine. Tr. 121. Rather, Shubert stated that the inspector, upon arriving at the mine, is to determine what appropriate order should be issued. Although Shubert stated that he could not recall if he stated to Turner that he was to issue a (k) order when he arrived at the mine, he did agree that under normal circumstances, the (j) will be converted to a (k) when the inspector physically arrives at the mine. Tr. 131-133. When JWR asked Shubert if a (k) order requires a mine emergency before one can be issued, the supervisor expressed that any accident could be an emergency, as the agency is not yet at the scene to see the situation firsthand. Tr. 137-138. Shubert did agree that for his District, District 11, based on *his* practice, a (j) order is issued when MSHA is not yet present at the mine and a (k) order may is issued after MSHA has arrived. Tr. 122. Although the (j) order temporarily stopped coal production on the Number 4 section, JWR was able to continue to run coal on the longwall. Tr. 153.

Even though the context of the report of an ignition inherently demands an immediate reaction from MSHA, as JWR would have it, a (j) order can only be employed by MSHA in a situation such as this only after a time consuming and deliberate process has first been

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[10](...continued)
mine, was something that he considered before imposing the requirement that is reflected on the third page of GX 1. Tr. 57.

[11] In this regard, Shubert agreed that he was aware of Mr. Turner's investigtion and that Turner had a hand-held methane detector, referred to as a "spotter," and that Turner collected methane evidence in the course of his investigation of the March 25, 2011 ignition at the Number 7 mine. Tr. 51-52. JWR delved into the methane readings as part of its larger argument that MSHA should not have issued the (j) order in the first place. As explained in the body of this decision, these points, in the Court's estimation were all for naught, because the methane readings have nothing to do with the legitimacy of Shubert's issuance of the (j) Order. Besides, use of the methane detector made sense. There had been an ignition, so it was prudent for Turner to measure methane levels when at the scene. However, as the Secretary correctly pointed out at the hearing, this proceeding is not about spotter data collected by Turner. Tr. 52. JWR was not cited for methane gas violations in this matter, nor is any section 104(d)(1) citation in issue in this proceeding.

employed.[12] This view flies in the face of the provisions of (j) and (k) and the 800 number to reach MSHA when an ignition occurs.

Continuing with its overarching theme, that MSHA must first establish a connecting link between the (j) order it issued here and the many previous (j) orders it issued to the Number 7 mine in the past 15 months, the Court permitted JWR to lard the record with its details regarding the circumstances of the prior ignitions.[13] Thus, JWR was permitted to go on about the set of event files, reflected by Exhibit 18, which provides details regarding the 23 "events" (i.e. ignitions) that are the subject of R 2. Tr. 70.

While the Court permitted JWR to put such information in the record, it made it clear that it thought little of the contention. The Court expressed that while an examination of the preceding 23 events may be "interesting" in some sense, it informed counsel that it believed MSHA's action could be sustained simply by looking at the particular event being challenged here. That is to say, in this Court's view, it is not at all necessary to examine the circumstances of the prior 23 ignition events in order to uphold the (j) order in issue here. Rather, MSHA's (j)

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[12] JWR had Shubert go through the ignitions listed on Exhibit R 2, beginning with January 12, 2010. Through that process, Inspector Shubert confirmed that no victims, injuries, or property damage was involved with that first listed date. Tr. 61. Shubert agreed that the same conclusions would be reached as to the ignitions listed in that exhibit. Tr. 61-68. However, some questions relating to the details of these many other ignitions could not be answered by Shubert based on that exhibit. For example, he could not state that there was no contributory citation found by MSHA for one; for another, he could not determine (again based on the exhibit before him) if a particular accident occurred on the Number 8 section face. That exhibit did not reveal the location in the mine for that event. Tr.63-64. Therefore, to answer such a question, he would need to review the underlying reports to determine the location. Shubert also qualified his answers as to the particulars surrounding individual ignitions by advising that he was speaking from memory as opposed to information contained in the exhibit. Therefore, it was his memory that there were no accidents or fatals during that time period. Tr. 65. He agreed that he didn't check into such underlying details from those prior ignitions when he modified the (k) order. Tr. 66. Instead, Shubert felt, *and the Court agrees*, that it was sufficient just to know that the mine had that number of ignitions during that period of time.

JWR counsel challenged Shubert to name an instance of an ignition in the 15 months preceding the ignition in issue here in which there was any violation found to have contributed to the ignition. Tr. 67. Shubert could not name an instance. Though he believed that there would be such associated events, he could not point to one. Tr. 67. Shubert did agree, however, that none on the list of that exhibit involved an injury or property damage. Tr. 67. It bears emphasis that, as Supervisor Shubert saw it, an ignition is an ignition. The Court agrees.

[13] Even JWR's Counsel admitted that MSHA's action was prompted only "in part" because of the mine's history, "among other things." Tr. 71.

order action can be sustained by looking at the particular actions taken here. To express this another way, the Court stated that it can examine "that moment in time" to determine the appropriateness of MSHA's action, and that the prior *particular* circumstances of those very many ignitions, good or bad, would not be determinative of the propriety of the issuance of the (j) or (k) orders here. The Court expressed further that the appropriateness can be determined based simply on the telephone call to Schubert and, focusing on that moment in time, notwithstanding the particulars of the ignition history. Tr. 72.

Accordingly, referring to MSHA Inspector Shubert's very limited role, the Court expressed that Shubert did what a responsible supervisor is supposed to do in such circumstances: dispatch an inspector to the mine to view the situation firsthand. Tr. 72.

Though covered already, JWR counsel then revisited the same points, which points were not being contested in any event.[14] Thus, Shubert repeated that there was no injury nor death in this instance and that he was not aware of any entrapment at the time he took the call from JWR. Tr. 77-78. However, Inspector Shubert also repeated his position that he was not aware one way or the other of such occurrences *at the time* he took the call from JWR.[15] Thus, he emphasized that *after the fact*, he determined those things did not occur, *but before the fact, that is, at the time he received the call,* he did not know. Tr. 78, 92. The Court finds this to be the fact.

Shubert agreed that no one told him that anyone had died. As to whether there had been any injury, he stated they never said "either/or." It did not occur to him to ask if there had been any death, injury or entrapment. Tr. 79. More importantly, Shubert affirmed that when he receives a phone that there has been an ignition, he acts, adopting the Court's characterization, in a "prophylactic" or "protective mode." Tr. 81. Shubert expressed that a (j) order does more than

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[14] Part of this included JWR's raising contentions that were either irrelevant or immaterial. These included having Inspector Shubert read from the statutory provision for Section 103(j), seeking the witness' interpretation of the provision. The Court explained that the meaning of the provision and its application to the facts established here were within the Court's province, not a particular MSHA employee's take on the matter. The Court further explained to Counsel for JWR that its examination of the witness should be confined to what Shubert heard, did and stated with regard to the events in issue. Tr. 77. Similarly, it simply does not matter that Shubert could not recall if he took a 1 800 number but only remembered that he spoke with Keith Plylar. Shubert referred to the former as an "escalation report" but noted that he doesn't get those until "hours after the fact." Tr. 79.

[15] As to whether he knew, when speaking with the JWR person who called to inform about the ignition, that the fire was out, Shubert stated that he did not recall. Tr. 80. As to whether there was any rescue or recovery work, he had the same response that "[a]fter the fact, no. But when I receive the phone call in the mornings, I don't know if we need to deploy rescue or what." Tr. 80.

protect against evidence destruction, that it also seizes the area. Tr. 89. *Shubert repeatedly expressed that MSHA issues the (j) order verbally because, at that point in time, they don't really know what is going on at the mine where the ignition occurred.* Tr. 93. As he more directly expressed the Agency's reaction to an ignition, "We err on the side of safety." Tr. 82.

Significantly, as Shubert noted, he does not have firsthand knowledge at the time the call is received, "[a]nd the individual that makes the call doesn't have firsthand knowledge [either]." This is so, because "they're getting the message from underground that the individual has called them and said that we've had an ignition." Tr. 82. In an abundance of fairness, the Court allowed JWR to rehash many previous questions and answers. Upon such re-asking, Shubert again stated that he did *not* know when he issued the (j) that there was no injuries or property damage. Tr. 126. Nor did he agree that he knew at that time that the event was over. And he denied that he knew there was no emergency when he issued the (j). Tr. 126. As noted, Shubert, possessing only third hand information, could not be sure of the situation. Even Plylar was only relaying what he was told by another. Shubert agreed that in every instance when he receives a call that there has been an ignition, he will then issue a 103(j). Tr. 83. As Shubert further stated, the (j) order is issued to "preserve the scene[] and to seize the area so the inspector can there and see if a rescue team is needed or what's needed, and then he will issue the appropriate order." Tr. 84. Thus, the Court expressed this approach as the Agency's determination that it needs to have "boots on the ground" to accurately assess the situation attendant to the ignition. As Shubert put it, until its inspector is actually at the mine, it simply doesn't know for sure what is going on there.[16] Tr. 84. This is critical because an ignition deals with the deadliest occurrence in a coal mine; the ignition of methane. Making matters potentially graver, it must not be forgotten that this mine is one of gassiest methane producers in the entire country. As the Court characterized it further, it is a better to have a safe rather than sorry approach to such an occurrence. Tr. 91.

MSHA Coal Mine Inspector Joseph Turner was also called as a witness for the government. Tr. 210. Based upon his history of inspection activity at the mine, Inspector Turner is quite familiar with JWR's Mine Number 7. Tr. 212-213. Turner related that Supervisor Shubert called his home around 6 a.m. on March 25, 2011 and told him to go to the Number 7 mine as there had been an ignition while miners were burning and welding.[17] Tr. 213-214. Turner then arrived at the mine around 7:30 a.m.[18] Tr. 216, 218. Shown R 4, Turner

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[16] In contrast, a (j) order issued after the inspector's arrival serves the more limited purpose of ensuring that evidence is not destroyed.

[17] Though the significance of whether "burning" occurred was not explained, it did not alter the fact that there was an ignition. Apparently, though the record has conflicting statements on this, there was no burning. Tr. 245. Turner agreed that the welding was going on outby the face and that as far as he knew, no other welding activity was going on at the mine. Tr. 313.

[18] Turner calculated that he got to the mine about an hour and a half after he received the (continued...)

identified it as his notes from that day. Tr. 217. Inspector Turner related that when he arrived he noted there was no ambulance, rescue truck or fire truck present. Having made that observation, once he left his car he advised JWR management at the mine that he would be modifying the (j) to a (k).[19] Tr. 223. Accordingly, the modification to the oral (j) was done before Turner interviewed the first miner. Tr. 225.

It was Inspector Turner's recollection that he then first spoke with either John Connellan, the mine's safety supervisor, or possibly with Keith Plylar. The more important point is that he informed that he was modifying the (j) to a (k).[20] Tr. 219-220. Turner stated that the 103(k) shut down activity inby the feeder on the Number 4 section, with the "feeder" being the loading point where the coal travels before it hits the conveyor belt. Tr. 243-244. Turner agreed that JWR's history of ignitions was part of the discussion he had with Shubert on modifying the (k) order. Tr. 283. Turner reaffirmed that his (k) order was issued before he went underground at the mine. Tr. 309. The sequence of the orders was that the (j) was modified to a (k), with the latter occurring shortly after Turner arrived at the mine and then at 3 p.m. the (k) was modified after he came out of the mine at which point the training requirement was imposed. Tr. 310.

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[18](...continued)
call about the ignition. Tr. 254. JWR Counsel described the time as "over two hours" before the (j) was modified to a (k) order. Turner, based on his notes, calculated the time of inconvenience to the mine at 1 hour 50 minutes. Under either computation, this seems to the Court like a small amount of time, given the deadly mix of a mine that releases such vast amounts of methane daily and has a penchant for routine ignition occurrences.

[19] JWR's Counsel attempted to characterize testimony and then proceed as if the characterization was testimony itself. As one example, when JWR Counsel asserted that changing the (j) to a (k) didn't change anything, the Court stated that was not a "fair characterization." Tr. 266. In this regard, the Court observed, "It seems to [the Court] that when [the inspector] gets there he doesn't just write with a blindfold on, [essentially stating] ["] [O]kay, let me just put [a] (k) here. No. He looks around and based on his experience he concludes that we don't have a need to keep the (j)." Tr. 266. The Court continued, "Now, [JWR] might say, well, he should have investigated further if he really was concerned. But, in any event, he makes the judgment, but it isn't [done] blind[ly]. He makes a judgment based on what he doesn't see. He doesn't see a rescue truck there, he doesn't see, you know, this or that there. He sees that things seem calm and so he changes it to a (k)." Tr. 266. Further, the Court observed, "But it isn't that nothing has changed. Something changed, he arrived there. He's [i.e. Inspector Turner] already testified . . . that had he seen inferentially - - he testified that *had* he seen a rescue team there or fire engines there, he probably would not have changed it to a (k). So, to say [as JWR's Counsel did] that nothing changed I think is artful but inaccurate." Tr. 266-267 (emphasis added). This, to the Court, seems like a very reasonable reaction upon MSHA *now being present at the mine site* and it also seems eminently prudent.

[20] In any event, the (k) order was terminated after the training had been completed.

Turner also expressed that, upon being dispatched by Supervisor Shubert, his responsibility was to conduct an investigation. Tr. 220. Turner was advised by JWR management as to the miners who had witnessed the ignition. He interviewed those miners[21] and after that was completed, he then went to the site of the ignition. Tr. 221. From his interviews, Turner learned that the flame varied from 2 inches to a foot and that it was extinguished with a wash down hose. Tr. 225. In the Court's view, this demonstrates that MSHA was not going through the motions; that this was a genuine and serious investigation.

Regarding gas tests, Inspector Turner expressed that some tests had been taken but "[t]hat the main one that was [his] concern [ ] had not been taken . . . ."[22] Tr. 225. After first completing the required imminent danger run, Turner arrived at the continuous miner where the ignition occurred. Tr. 227. Part of his testimony concerning his observations at the underground location of the ignition, included methane readings he gathered.[23] The methane readings were brought out by Counsel for the Secretary as background to explain Turner's decision to later terminate the 103(k). Turner also described the location where he found the continuous miner, where he noted bubbling water on the mine floor. Based on his experience, this can mean that methane is bleeding out of the mine floor. Tr. 234.

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[21] Seven miners were interviewed. Turner's interview had each witness describe what he saw, the color of the ignition, how long it lasted, and if the miner assisted in putting the ignition out.

[22] As brought out by JWR Counsel, Turner did find, in reviewing JWR's record books that day, that the mine "didn't do adequate gas checks where they were required." Tr. 255. In the Court's view, this failure, though not the only reason, in itself can support the reasonableness of MSHA's requirement for training.

[23] When Turner began testifying about his methane readings, JWR objected on the basis that the data behind the spotter had been lost or was otherwise unavailable. Tr. 229. The Court rejected JWR's claim that MSHA lost its methane spotter notes from the date on purpose. Further, it notes that the issue is irrelevant to the issues in this proceeding, as JWR was not cited for an inadequate methane testing. In any event, the Court rejected JWR's contention that it should not consider any of the methane readings Turner made because the underlying data was no longer available. Tr. 229-231. Given that ruling, Turner noted that he did record find one reading at 4.8 %. The ignitability range for methane is between 5 to 15 percent. Tr. 230-231. Further, when Inspector Turner tried to testify that the state mine inspector, Dale Johnson's, methane detector went off, there was another objection. Tr. 236. Turner heard Johnson's device sound and explained that meant a reading of over 1% methane was detected by the device. However, Turner never viewed the number reading from that alarm sounding. Tr. 237-240. The Court took the opportunity to express its view that whether methane readings indicated an issue or not, that data was not, in my view, determinative of the validity of the 103(j) order in issue here. Tr. 238-239. SOL attorney explained that these questions were being asked to explain, in part, the basis for MSHA's requirement of training here, as JWR has alleged that the agency abused its discretion.

Turner affirmed that, prior to arriving at the mine, he knew no details about the ignition other than what Supervisor Shubert had told him. This amounted to being advised that there had been an ignition on the number 4 section involving welding activities. Tr. 246.[24] Turner informed that Shubert simply told him two things: the mine had an ignition and that he, Turner, was needed to go to the mine and conduct an investigation of that event.[25] Tr. 248. Turner did state, upon questions from JWR's Counsel, that he would "imagine there wasn't a fire ablaze because he [i.e. Shubert] would have said [that was the case], *I would imagine*, *if he* [i.e. Shubert] *knew*." However, these statements from Turner are not especially informative because they reflect that Turner was merely speculating when he said he "would imagine" what Shubert would have said and because the second aspect of his response reflects his view that Shubert may not have known what exactly was going on.

Shubert did acknowledge that he conferred with Turner about the training that would be required, and that it would apply to every employee at JWR. He also agreed that when he issued the (j) order orally, only the maintenance crew was involved in the ignition. This training covered ignitions, firefighting, burning and welding and it took only about an hour to conduct it. Tr. 241-242. In terms of its content, to the Court, the training made sense, given the extensive ignition history at the mine. It also seemed to be a very modest price, considering the continuing

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[24] Counsel for JWR made several attempts to demonstrate that Turner actually *knew* that there was no emergency at the Number 7, but Inspector Turner repeated that all he knew was what Shubert had relayed to him. The Court finds this to be credible. After all, Shubert only passed on the little he knew, and his information from Plylar was at best second hand itself.

[25] There were times when JWR counsel, in the face of answers he did not welcome, and upon trying the same question again, would face a ruling from the Court that the question had been answered several times. JWR Counsel would then try to place his own characterization on the testimony, as if his remarks were findings of fact about such testimony. "I hope that it's a demonstrative (sic) [demonstrated] fact that it was converted to a (k) without new information." Tr. 253. Unfortunately, that is not what the witness' testimony demonstrated. Contrary to JWR's depiction, Turner did indeed have new information: that of seeing, upon arriving at the mine, that no emergency type equipment had been assembled. That told him important information at that moment. It may not have been enough information in JWR's eyes to warrant converting the (j) to a (k) order, but that does *not* mean that Inspector Turner was without new information when he modified the (j). As another example, in the context of revisiting topics already covered, JWR Counsel added his own characterizations to prior testimony, calling the ignition, for example, a "mere flame." Tr. 318. The Court pointed out that JWR Counsel's characterization of Inspector Turner's testimony was "more than a stretch," as Turner's actual response was "Well, it wasn't an explosion so that's all it could be, was an *ignition.*" Tr. 320. The Court views this litigating approach as unfortunate because it attempts to recast testimony from the words that were actually used in a response. This is a transparent attempt to *create* testimony through Counsel and then see if the witness will buy into it. Thus "mere flame" was JWR counsel's choice of words, not Inspector Turner's.

ignition problems. Tr. 242. In making the determination, which the Court finds to be MSHA's determination to make, *not JWR's*, Shubert stated that he conferred with Inspector Turner and with others in the agency, including Shubert's superiors. Tr. 157. At any rate, Shubert stated that it was a discussion between Turner and him, not an edict on Shubert's part, because it was Turner who was present at the mine. Tr. 158. Critically, Shubert stated that if Turner had elected to train less than the entire mine, he would have permitted that. Tr. 161. As Shubert elaborated, it was the large number of previous ingitions, 23 at this mine, that brought about the broad action of requiring training for all miners. Tr. 162.

It is fair to state that the Contestant's case began with what the Court viewed to be as irrelevant matters. Its first witness, Mr. Mike Parris, is a paralegal with Walter Energy's legal department. Mr. Parris collected data from the spotters used by the supervisor and welder on 4 section during March 2011. Tr. 324. Those spotter readings represent atmospheric readings during the time in question. JWR proposed exhibits 15 & 16. Parris' role for these exhibits was solely to authenticate those potential exhibits. Tr. 326.

Upon Counsel for JWR affirming to the Court that the purpose behind its effort to have those records made part of the record, namely that "in some form or another [it is JWR's stance that] the agency should have looked at [the spotter data] in [proposed exhibits] 15 and 16 before issuing the 103(k) or even the 103(j) before they acted[,]" JWR Counsel responded, "Yes, sir." Tr. 330. The Court inquired of Mr. Parris if the readings in those potential exhibits identified the particular area where they were taken, and Parris he advised they did not. Tr. 329. The Court then ruled that proposed JWR Exhibits 15 & 16 were not admissible, as they were irrelevant. Tr. 330. Of course, it is fair to comment that if the agency should have looked at all this data before it issued a (j) or (k) order, and if it really was as instructive about the inappropriateness of MSHA's action, it would seem to follow that the ignition should never have happened. But, it did.

Consistent with its view about all the steps MSHA should take before issuing (j) or (k) orders, despite the admitted fact of an ignition occurring, JWR then sought to have proposed Exhibit 19, a summary of the ignitions investigated by District 11 in the period from January 2010 up to April 2011, and proposed Exhibit 18, a stand-alone binder that has 23 MSHA ignition event files in a complete form, both admitted. Tr. 332-334.

By comparison, R's Ex 2 is drawn from MSHA's database and includes a short description of events reflected in JWR's proposed Ex. 19, while proposed Exhibit 18 is the full document itself, not a summary. Tr. 335. The government objected to proposed JWR Exhibit 19 as irrelevant, on the basis that the ignitions and the particulars of them are not in issue in terms of a 103(j) or (k). Tr. 336. Although the Court agreed that these exhibits are irrelevant and immaterial, it factored the likelihood that JWR will appeal the decision and, therefore, to aid any review, it decided to admit Exhibit 19, the summary, but not Exhibit 18.[26] Tr. 337-339.

[26] Although the Court was ever mindful of providing any reviewing body with a more (continued...)

JWR's next witness was Mr. Ty Olson. Olson is presently the underground manager at the east quarry for the Number 7 mine. Tr. 340-341. Directed to proposed JWR Exhibit 22, which is a map of the Number 7 mine, the witness identified the locations on it of the 23 ignitions that were in the event file. Tr. 342. These location listings correlate to R's Ex. 2; the JWR exhibit lists the first ignition from R 2 and it then labels the others consecutively. The numbers on the map also correspond to the numbers on JWR 19, the summary. As with the Court's ruling admitting Exhibit 19, and despite finding that the information was neither relevant nor material to the issues in this case, Exhibit 22 was admitted, essentially for the benefit of any reviewing body, so that it could see for itself that the evidence was not pertinent to this proceeding.[27]

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[26](...continued)
than complete picture of JWR's contentions, there were limits. Some JWR proposed exhibits were so far off the mark that they could not satisfy the lenient standard for admission of JWR's proposed exhibits. One such example was proposed JWR Exhibit 20. This consisted of JWR notes from a meeting between MSHA and the mine about ignitions and plans that were submitted and approved for the operation of the Number 2 longwall and the Number 4 section. Tr. 361. It was JWR Counsel's design to use the notes to show dialogue between MSHA and JWR. The dialogue JWR wanted admitted pertained to the day before the ignition in issue in this litigation and, for JWR, it reflects that MSHA's focus up to then was all about "engineering changes and behavioral process-type changes in connection with mining coal at the face of the continuous miner sections and both longwalls." Tr. 364. Therefore, JWR contended that the welding ignition was very different and MSHA should not have been able to consider those other, different, ignitions sources. Tr. 364. From this, JWR contends that MSHA abused its discretion. Apart from the obvious evidentiary issues of such purported "proof," while JWR's notes are consistent with its view that MSHA must finely distinguish the types of ignitions involved before acting in a particular ignition event, it is completely immaterial to the propriety of MSHA's actions here.

[27] Although, again, the Court determined that the Exhibit 22 added nothing to the issues to be resolved, the following was included for the benefit of aiding anyone who may wish to examine it. The map represents all of the Number 7 mine. Tr. 350. The map would look different today because of additional mining. The witness identified the Section 4 as in the upper left portion of it, just above the letter L. Tr. 347. K, J are the designations for the longwall panels. Tr. 347. Olson stated that there are 3 colors on the map; white, green and yellow highlighted areas. The yellow highlights are A,B,C, etc and also E1, E 2 are in yellow. Tr. 348. The green areas all represent areas that have been sealed. Tr. 349. Turning to the area D through L, the witness confirmed those all represent active mining areas. Tr. 349. With the top of the Exhibit as L, moving down towards A, there has been additional mining and this mining has progressed beyond what is depicted on the map. Tr. 350. Olson stated that mining is progressing in an upward direction above the "L" and to the left. Tr. 351. He added that for E 1, E 2 and E 3, those are all active mining areas, which have progressed as well, moving down and
(continued...)

JWR also drew attention to Ex 21, the MSHA (k) order dated March 23, 2011. Tr. 352. The government objected to the relevance of Ex 21 because it did not deal with the (j) or (k) orders in this case. Tr. 353. In any event, Olson stated that MSHA had a (k) order permitting the miners to perform maintenance on the miner. The miner's drums were being changed because of an ignition that occurred two days earlier. Tr. 354. It is JWR's apparent contention that because the ignition, occurring a mere two days before the one in this litigation, was a frictional ignition, whereas the ignition here was caused by a spark from welding, MSHA should have distinguished the ignition subsets. Tr. 355. Apparently, it is JWR's position that MSHA should not have noticed the forest of ignitions and instead should have focused on the variety of trees in that accident forest.[28]

JWR's last witness, the only witness supplied by JWR who could offer relevant information about the ignition in issue here, was Chester Keith Plylar. Mr. Plylar is now a safety coordinator and safety director at the mine and he was working at the Number 7 mine on March 25, 2011, arriving around 5:30 a.m. Tr. 369-370. That morning he received a call from the control room operator ("CO") informing that "they had an ignition *burning*[29] and welding on a miner head up on Number 4 section and that they had the ignition put out and that it lasted approximately a few seconds." Tr. 370 (emphasis added). It is important to note that the CO's call came from the control room, which is located *on the surface*. Tr. 370. Thus, not only was the information Plylar relayed to Shubert not firsthand from Mr. Plylar, even his source, the CO, was relaying *what someone told him.* In fact, the record does not reveal, one way or the other, if the information given from underground to the CO was from an eyewitness to the ignition either.

In any event, Plylar stated that he was told that the ignition was out and that no one was injured and that this call to him came around 5:50 a.m. Tr. 372. Plylar then called the 1-800 number to report the ignition. He reached a person, but could not remember that individual's name, nor did he write it down. Following that call, Mr. Plylar called Mr. Shubert, reaching him around 6:00 a.m. Tr. 373. According to Plylar, Shubert told Plylar that "he was issuing a (j)

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[27](...continued)
to the right. Tr. 351. Again, the Court considered all of this to be immaterial.

[28] In an apparently related contention to its argument that MSHA should have examined the particulars of each ignition, JWR Counsel asserted that because, out of the 21 some ignitions, there were only 3 instances in which a violation resulted, MSHA has no business imposing mine-wide training. Tr. 360. However, the Court notes that the "violation and ignition" pairing which JWR would require, *if it were MSHA*, is not found in Congress' expressed concerns about ignitions in section 103 (j) or (k).

[29] It appeared to the Court that Mr. Plylar had been well schooled when speaking about the ignition. As to the status of things after the ignition, Plylar remarked: "Basically that was the extent of it, that they was *burning* on the - - excuse me, *welding* on a miner head and that the ignition was out and lasted approximately a few seconds and no one was injured." Tr. 375 (emphasis added).

order at that time. Plylar knew the (j) order only applied to the affected area, that is, where "the actual welding was going on on the [continuous] miner." Thus, he knew it did *not* apply to the entire mine. Tr. 385. Plylar at first stated that ended the call, but then added, " . . . let me back up. Either he [i.e. Shubert] said that no work in the affected area *or I told him, I said we will not do any work in the affected area.*" Tr. 376. (emphasis added).

Plylar also stated that he was familiar with the second modification of the (k) order, in which MSHA required training.[30] Tr. 376. In fact, he typed up the outline for the training, noting that it included going over "the ignition *preventions* and all that with them and things to look at." Tr. 377. (emphasis added). Thus, the Court observes, at least Plylar recognized that it is not about classifying ignitions and grouping sources of ignitions, as JWR would have it, but rather that the idea is the *prevention* of ignitions. As to whether any of the training dealt with welding underground, Plylar affirmed that it did, "Yes, it was addressed as . . . either a PIL or a PIB from MSHA about taking methane checks next to the mine roof, rib, of the floors." Tr. 377. The training also spoke to those things to do "*to prevent any type of ignitions.*" Tr. 378. (emphasis added).

DISCUSSION

Plain Meaning and Deference to Secretarial Interpretation of the statutory provisions.

The formula for statutory interpretation in this context is well understood. Per the *Chevron* formulation, one first examines the plain meaning of the statutory terms but, if the conclusion is that the answer is not clearly revealed by that process, the interpretation made by the agency charged with enforcement of the act is given deference.

Although the "plain meaning" analysis is the first step in interpreting a statute, that process is not robotically applied. Accordingly, the plain meaning rule "does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute." *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1127 C.A.9 2005, citing, *Lungren v. Deukmejian*, 45 Cal.3d 727, 248 Cal.Rptr. 115, 755 P.2d 299, 304 (1988). Thus, "[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." *Id.*

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[30] In another example of what the Court viewed as immaterial and irrelevant information, Contestant's Ex 17, the Task Training form, was still admitted. MSHA required the training, as discussed in this decision, but it did not require JWR to provide the forms, as proof that the training was conducted. MSHA only asked to see the training outline. JWR provided the forms anyway. Tr. 380- 381.

This approach was echoed in *Meredith v. Federal Mine Safety and Health Review Com'n*, 177 F.3d 1042, C.A.D.C.,1999 where that court applied common sense in interpreting whether the word "person" under section 105(c)(1) included MSHA officials. While it acknowledged that the starting point for any analysis is the text of the statute, it noted that "plain meaning and literal meaning are not equivalents and that there can be instances when focusing on the text alone can make the plain meaning elusive. *Id.* at *1055. The process requires "moving beyond the text . . . to examine the statutory scheme in which it reposes . . . ." *Id.*

Other courts have also addressed this issue. For example, in *Sosa v. U.S.* , 550 F.2d 244, C.A.Tex. 1977, it was observed that a court which employs the "plain meaning" approach and interprets the terms and scope of a statute literally, without inquiring whether that literal meaning is consistent with Congress' purpose in enacting the statute, fails to respect adequately Congress' lawmaking power. For these reasons, the Supreme Court repudiated the "plain meaning" approach nearly forty years ago: "Often (the words of a statute) are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' " *United States v. American Trucking Ass'n*, 310 U.S. 534, 543-44, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1940).

Where plain meaning does not resolve the question, the Chevron principles direct that deference be afforded to the Secretary's reasonable interpretation of the provision in issue.[31]

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[31] As noted earlier, JWR asserts that not even *Chevron* deference applies here. To reach that conclusion, it looks to a 1944 decision, *Skidmore v. Swift*, 323 U.S. 134, and *Christensen v. Harris County*, 529 U.S. 576 (2000). For a number of reasons both are peculiar sources to cite. This is because *Skidmore* upheld the idea that the administrator's policies and standards *are* entitled to respect, because its policies are made "in pursuance of official duty, [and] based upon more specialized experience . . .." *Id.* at *139. The district court was reversed for failing to follow that deference. In *Christensen*, another Fair Labor Standards Act case, the issue was whether an employer could force employees who had accrued compensatory time to use up that accrued time instead of having to pay them cash for it. Among other reasons, *Christensen* is distinguishable in that it involved regulations and the impact of a Department of Labor opinion letter which concluded that an employee must agree to such an arrangement. Although several Justices disagreed over the viability of *Skidmore* after *Chevron*, a majority concluded that such enforcement guidelines *vis-a-vis* a regulation's meaning are entitled to respect when supported by their power to persuade the correctness of the agency's interpretation. *Christensen* at *587. More importantly, unlike the arcane subject of compensatory time, at hand here is a central concern of coal mining: ignitions. This is a subject which is plainly within the realm of the

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Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir 2003). It is also clear that, it is the Secretary, not the Commission, that is entitled to deference in interpreting the Mine Act. *Secretary of Labor v. Federal Mine Safety & Health Review Commission***,** 111 F.3d 913, 920 (D.C.Cir. 1997). As the Secretary noted in its Reply Brief, "[a]s long as the Secretary's interpretation is reasonable, it is entitled to deference even if the Court would not choose [that particular interpretation]." Sec. Reply at 5, citing *Dept. Of Treasury, IRS v. Federal Labor Relations Authority*, 494 U.S. 922 (1990) and *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116 (1985).

The full text of 103(j) and 103(k) have been previously noted. However, for the purposes of this case, the pertinent focus is only upon the following aspects of those provisions.

> **In the event of any accident** occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes therof. . . . In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

Section 103(j) (emphasis added)

> **In the event of any accident** occurring in a coal or other mine, an authorized representative of the Secretary, *when present*, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, . . . of any plan . . . to recover the coal or other mine or return affected areas of such mine to normal.

Section 103(k) (emphasis added)

The Court notes that these two provisions, following one another, as they do, deal with a singular defining subject: **the event of an accident**. That is, *in both provisions*, Congress spoke to the subject of the event of an accident. "Accident," of course, is a defined term under the Mine Act and the definition of that term provides that it includes "a mine explosion, *mine ignition*, mine fire, or mine inundation, or injury to, or death of, any person." (emphasis added). There is no dispute that the triggering phrase for these two statutory provisions, the event of an

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[31](...continued)
agency's expertise and as such it necessarily encompasses MSHA's interpretation of sections addressing this grave concern to mining safety.

accident, was applicable here, because an ignition occurred. In fact, the event which precipitated the issuance of the (j) order in this litigation was the 22nd (twenty second) such ignition at JWR's Mine No. 7 in the previous 15 months.

Focusing for the moment on section 103(j), under the terms of the provision, it is important to take note that the "[i]n the event of any accident" phrase *appears twice within that single provision*. By repeating that phrase, all within (j), Congress spoke to two separate classes of accidents: those where there was an accident and those where the accident also necessitates rescue and recovery work.

The first order of business under the non-rescue and recovery accident situation, is for the operator to notify the Secretary that there has been an accident event. The same sentence continues with the requirement for the operator to "take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes therof." Given that it is *the Secretary* that is to be notified of any accident, and that steps are to be taken to prevent evidence destruction, it necessarily follows that the Secretary is the principal authority to be conducting an investigation into the cause(s) of it.

The Commission has long recognized the role of the Secretary's principal role in such investigations. Twenty-five years ago, the Commission noted that to be the case. As they explained in *UMWA V. Greenwich Collieries:*

> Orders issued pursuant to section 103(j) or section 103(k) of the Mine Act, 30 U.S.C. § 813(k), are commonly known as 'control orders' since they are the means by which the Secretary may assume initial control of a mine *in the event of an accident* in order *to protect lives*, initiate rescue and recovery operations, *and preserve evidence*.

8 FMSHRC 1302, *1308 at n. 2 (September 1986) (emphasis added), 1986 WL 221618, (F.M.S.H.R.C.)

There are two approaches to interpreting the provisions of 103(j). One, as reflected by the Commission's decision in *Greenwich Collieries*, is that, in the event of an accident, the plain wording of the section gives wide berth to the Secretary to take *whatever action* he deems appropriate to protect the life any person. This only makes sense, remembering that starting point for both sections (j) and (k) is the event of an accident. Obviously, the first sentence of section 103(j) contemplates Secretarial dominance in the event of an accident; the mine operator must notify the Secretary and an investigation of the cause or causes is explicitly required to be performed. That this investigation is to be performed by the Secretary is clear. The Secretary is to be notified, and appropriate measures are to be taken to prevent evidence destruction.

Those steps are not mere inferences. It would *not* be reasonable to conclude that the Secretary is directed to be notified *simply* for the purpose of being informed that an accident occurred. Nor is the provision's directive that a mine operator is to take measures to prevent the

destruction of evidence, a requirement that occurs in a vacuum. Clearly, both the notification and the preservation of evidence are imposed for the purpose of the *Secretary's* investigation into the accident's cause.

While the first sentence of 103(j) by itself is sufficient, providing the Secretary with full authority to take appropriate actions for the purpose of investigating an accident's cause, the third sentence, taken in a common sense fashion, can be read as a further clarification of the Secretary's plenary authority in accident events. This is because, the third sentence again begins with the defining event which triggers the section's applicability: the event of an accident. If the 103(j) provision were strictly about rescue and recovery work, there would be no need to express that defining application a second time.

Read in the context of the initiating event, an accident, it only makes sense that the Secretary, the one who is to be notified, can take *"whatever action he deems appropriate* to protect the life of *any* person." That this power is untethered to the particulars of rescue and recovery is made clear by the concluding sentence of 103(j) which provides "and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine." If the Secretary's authority were confined to rescue and recovery particulars, the last sentence would be superfluous.

Equally important, even if one can contend that the literal phraseology of the section does not command the conclusion stated above, it is certainly within the deference ambit of *Chevron,* as a reasonable Secretarial interpretation. Viewed from the obverse, no one can seriously contend that the words employed by the section *prevent* or *preclude* the Secretary's actions here.[32]

The Secretary also contends that the plain language of section 103(j) does not limit its use to circumstances where the inspector is physically present at the mine. Reply at 4. The Secretary notes that, for (j), the absence of the limiting language found in sister section 103(k), wherein the requirement for presence at the mine is necessary. Instead, it is JWR that is attempting to read into the provision a requirement that an inspector must be present in order to issue a 103(j) order and that, somehow, an oral issuance of a section 103(j) order is not allowable. Reply at 5. The Court agrees.

The Court also agrees with the Secretary's observation that, as "[t]he first sentence of Section 103(j) requires operators 'in the event of any accident occurring in any . . . mine' to 'take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof' [it follows that] [s]ince the resumption of mining and the presence of people in the affected area could destroy evidence, it is reasonable to interpret

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[32] Though issued two days after the 103(j) order issued here, the Secretary's Program Policy Letter, No. P11-V-09, supports *the Court's independent conclusions* about the provision, under either a plain meaning or reasonable interpretation approach. Thus, it demonstrates the reasonableness of the determinations made by the Court.

the phrase '[a]ppropriate measures to prevent the destruction of evidence' to include a requirement that [,] unless MSHA gives an operator permission to do otherwise, operators must withdraw miners from the affected area until MSHA arrives on the scene to investigate." That being the case, the Secretary maintains that prior to its arrival at the mine, it may issue orders consistent with this authority to preserve evidence, which of necessity can encompass the withdrawal of miners from the affected area. Reply at 6.

It is also important to recognize, as the Secretary points out, JWR's position would mean that when "MSHA is notified that an accident has occurred at the mine, [ ] MSHA cannot do anything until an MSHA inspector is actually at the mine [and during that interval] precious time can be wasted." If JWR's approach were accepted, it would mean that it could "act without any supervision from MSHA during an accident and its immediate aftermath" until MSHA arrived at the mine. Reply at 7.

The sister provision of section 103(j), section 103(k), continues the Act's attention to the "event of any accident" at a mine. As with (j), it directs *the Secretary*, now present at the mine where the accident occurred, to *issue such orders as he deems appropriate* to insure the safety of any person in the mine. In this matter, the Secretary's subsequent action records that the (j) order was modified to reflect that MSHA, with Inspector Turner once present at the mine, was proceeding "under the authority of 103 (k). That (k) order reminded JWR that the modification "still protects the safety and health of the miners," but that it allowed actions to be taken by the operator with prior approval by an authorized representative of the Secretary. Order No. 8519555-01.

With these observations in mind, this Court agrees with the Secretary's position that once there has been an accident at a mine, and here it is again noted that there is no dispute – JWR admits *there was an accident* at the No. 7 Mine – in the form of an ignition – MSHA has the authority under sections 103 (j) and (k) to impose whatever reasonable measures it deems to be appropriate and necessary. To appreciate the vital need for MSHA's authority under these provisions, it is useful to recall the core facts of March 25, 2011.

JWR mine supervisor Keith Plylar contacted MSHA's emergency hotline and the same individual also contacted MSHA supervisor Jacky Shubert, reporting that there had been an ignition on the number 4 section of the No. 7 mine. Supervisor Shubert, acting with caution, and proceeding under section 103(j) of the Mine Act, reminded JWR that it was obligated to preserve all the evidence resulting from the accident. Shubert then advised Plylar that he was going to send an inspector to the mine in order to confirm whether there was a necessity to continue the 103(j) order. Thereafter, MSHA inspector Joseph Turner did arrive at the mine, a mere hour and half later and, upon determining that there was no need for rescue and recovery, he withdrew the 103(j) order and replaced it with a section 103(k) order. Inspector Turner then interviewed witnesses who had information about the ignition and learned among other information that a supervisor had failed to properly monitor for methane gas while working in

the number 4 of mine No. 7.[33] As a result MSHA, acting through Inspector Turner, required all JWR employees to be trained in ignition recognition.[34] This was prompted, in part, by the undisputed fact there had been over 23 reported ignitions in the past 15 months at the mine. Tr. 9

It is in this context that the Court determined the reasonableness of MSHA's action at the time that the events unfolded. Because each event of an ignition is a serious matter in its own right, what happened with prior ignitions cannot be used to confine MSHA's ability to respond to a new ignition event. Restated, the particular circumstances of past ignitions can not tie MSHA's hands in addressing the problem of the chronic repetition of ignitions at the Number 7 mine.

JWR is not MSHA. MSHA is MSHA.

JWR's fundamental misunderstanding in this case stems from its failure to recognize that the Mine Safety and Health Administration, not JWR, is charged with the enforcement of the Mine Act. Here, MSHA reasonably imposed the (j) order, and minimally interrupted *part* of JWR's operations for an hour and a half. Thereafter, upon Inspector Turner completing his investigation, and upon consulting with his MSHA supervisor, imposed the training requirement associated with the (k) order's issuance.

Because JWR has mixed up its role with the Agency's mandate to protect the safety and health of miners, if it had the authority, instead of MSHA, JWR would have limited the training to the 2 percent of the work force that was involved in welding, burning or soldering. Tr. 379. However, because this is up to MSHA to decide, not JWR, the agency made the reasonable

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[33] To be clear, it was the March 25, 2011 ignition, coupled with the frequent string of ignitions during the previous 15 months, that prompted MSHA's ignition training requirement. The supervisor's failure to monitor for methane was not the decisive event.

[34] Regarding the "severe penalty" to "shut down the whole mine to retrain all personnel on ignition safety," JWR expresses its underlying and primary objection. Despite 23 ignitions in 15 months at this extremely gassy mine, JWR reveals its true objection: the training left the Number 7 mine "well behind its production schedule." JWR Reply at 12. That claim, that JWR was put "well behind its production schedule," it should be noted, being merely an assertion by counsel, is *not* supported by *any* record evidence. Regardless of that claim, the more important point is that, since the days when Congress relieved the Department of Interior from its dual, but conflicting, mandates to both develop natural resources and protect the safety and health of miners, and transferred the safety and health concerns to the Department of Labor, it was decided that production must take a back seat to safety. What JWR describes as "drastic" orders, in truth, only inconvenienced the mine for two hours in the case of the (j) order and required much needed retraining about igeinnitions in the hope of warding off a mine tragedy. These impositions, far from being "drastic," were prudent under the circumstances, and wisely required under MSHA's mandate under the Mine Act.

decision that, in view of the high number of ignitions during the past 15 months in which the Number 7 seemed to resemble a pyrotechnics facility, it was appropriate to impose mine-wide miner training, to reduce or eliminate the ignition frequency. Although it would seem unnecessary to state the obvious, perhaps it must be recalled that mine ignitions remain a grave concern for underground coal mining. Ignitions have been associated with nearly every major coal mine disaster. Accordingly, MSHA's decisions, acting under the authority of these provisions, is found to have been lawful. In fact, it seems reasonable to conclude that not only did MSHA not abuse its discretion, when evaluated in the context of the plethora of ignitions at one of gassiest mines in the United states, but had it failed to act in the manner in did, such inaction could have been viewed as an abuse of its discretion, and inconsistent with its mandate.

Although JWR noted that an ignition, by itself,[35] is not a violation of law, to the Court, rather than diminishing the importance of an ignition, that observation actually serves to underscore the importance of the (j) order, as a critical tool for MSHA to be able to employ. As Supervisor Shubert expressed it, "[o]ne ignition is too many ignitions. And when you have 23 in a 14 period which leads the nation in ignitions, that's when a red flag goes up."[36] Tr. 66

As the Court also explained to JWR Counsel, "not only did the Government act appropriately based on what [the Court] heard so far . . . but they should act that way . . . when they get a call and the mine says, you know, we've had an accident. The way that [JWR Counsel] seem[s] to be suggesting that the Government should behave . . . that . . . MSHA should behave . . . would be a recipe for second-guessing. Better to err on the side of caution until you get people out there. [MSHA] act[s] promptly, Mr. Turner doesn't drag his feet. He switches it to a (k) order, maybe sooner than he had to, seems to [the Court to be] all very reasonable. And importantly from [the Court's] perspective, this is a remedial act. Its intent is to protect the safety and health of miners. [MSHA's actions in this case were] entirely consistent with that approach to err on that side in the name of what that act and its various changes have been all about."[37] Tr. 269.

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[35] Tr. 61.

[36] The Court expressed that, even if there had been only a single ignition, it would be sufficient to sustain the 103(j) issued here. MSHA stated that a purpose of pointing out the history of so many ignitions was to rebut the claim that the agency had abused its discretion. Tr. 27.

[37] Curiously, while making much ado about its assertion that MSHA treats (j)s and (k)s "the same," in response to the Court's offer to allow *all* of Inspector Turner's deposition into the record, JWR Counsel was not so keen on having *all* of it come in. The Court noted "[t]he problem with that approach is that that could be too selective. And [the Court] wouldn't want to prohibit counsel for the government from being able to say yes [,] [t]hat sliver says that [b]ut if you go back and take the wide-angle view, there's more to it. So . . . [i]t's either in [,] in toto or it's not in, but not slices of the cake." Tr. 272 The Court then asked if JWR Counsel wanted it

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Further, JWR misses the larger point: ignitions, by themselves, are sufficient for MSHA to take the action it did here. JWR's micro-managing approach would enfeeble the agency and effectively require a showing, either in the instance at hand or through prior ignitions, that there had been earlier human or property damage or some sort of commonality to the ignition causes before it could issue a (j) order. Congress could not have intended so little agency authority in the context of the relation between ignitions and mine accidents.

Although the foregoing reasons establish MSHA's authority under section 103(j) and (k) to deal with mine accidents, other contentions raised by JWR are now addressed, briefly.

JWR's assertion that MSHA can look to other regulatory tools.

JWR contended at the hearing, and in its post-hearing brief, that 30 CFR Section 50.12,[38] a regulation applying to the preservation of evidence, is available to the agency and therefore it need not rely upon the (j) order. Tr. 95, 101. However, Supervisor Shubert observed that the regulation did not apply in the circumstances of this case. Shubert explained that the section does not apply at the moment an ignition occurs. Instead it comes into play comes into play after the fact and there is a civil penalty associated with it. Tr. 96 - 97. The Court agrees with Shubert's point. MSHA could hardly invoke that section over the phone in response to a call that there had been an ignition. That section only can be invoked, as Shubert noted, after the fact and where it is determined that the regulatory section was violated, thereby triggering a citation or order and later a civil penalty.

The impact of the Agency's administrative statements regarding (j) and (k) orders.

JWR turns to JWR Ex 13 and the MSHA handbook, dated November 2000, which provides guidance for the issuance of (j) and (k) orders.[39] Tr. 311. JWR points to the

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[37](...continued)
in and the response was "[d]o I have to say now?" Tr. 272. One would think that if Turner's deposition so clearly demonstrated the unreasonableness of MSHA's action, JWR would have enthusiastically wanted all of it, not simply selections, admitted.

[38] JWR does not point to any other statutory or regulatory power the agency may employ. Further, JWR's counsel's suggestion that Supervisor Shubert could have used the pre-existing (k) order is not accurate because Shubert had *at his disposal only one tool,* namely the *103(j) order.* Tr. 208. Further, as Shubert pointed out, the 103(j) was issued for a burning and welding ignition whereas the 103(k) was issued for a frictional ignition in the face area and further noted that these were two different areas, one was outby while the other was inby. Tr. 208.

[39] Without actually elliciting Turner's affirmative agreement with its claim, JWR Counsel asserted that Turner was "following the guidance of [the] handbook on (j) and (k) orders [ ]" and then tacked on to that remark, with no pause, "This is still the MSHA handbook we were looking
(continued...)

administrative guidance MSHA has issued on the subject, noting that a statement within an MSHA Handbook states that the primary purpose of a 103(j) is to prevent additional injuries when it becomes obvious that unsafe procedures are being followed. Handbook item B. Tr. 104. However, this is a selective reading from the Handbook, as JWR's interpretation would effectively eliminate the phrase "primary purpose" and read it as if it stated that this is the "sole purpose" of a (j) order.

Confusing its *personal interpretive view* with MSHA's *authority* to interpret the statute, JWR contends that the MSHA handbook or policy is that a (k) order is to be "restrained to the conditions that were peculiar to the site of the flame.[40]" JWR Counsel assertion at Tr. 313.

JWR also contends, in its Reply Brief, that the Secretary "cherry-pick[ed] [the] facts" and by doing so skirted the evidence showing that she violated the Mine Act and abused her discretion. The "facts" JWR contends the Secretary entirely omitted involve the (k) order issued on March 23, 2011, two days before the (k) order in issue here. Tr. 163. JWR agreed that "part" of its objection here is its contention that one can't have another (k) order for the same (4 section) area.[41] Tr. 163. JWR's position is that this earlier (k) was lawful. Tr. 165. JWR Ex 21. That earlier (k) order, JWR Ex. 21, was terminated on March 29 at 8:43. Tr. 169. JWR regards the previous (k) order as "crucial" to its contention that the Secretary acted "arbitrarily and capriciously" on the theory that one (k) order issued on top of another (k) order "over the same area" operates to preclude JWR from its statutory right to review such orders for temporary relief. JWR Reply at 1-2. While offended that the Secretary did not fully address the earlier (k) order, JWR seems to be more offended that the Secretary mentioned "other, less relevant pieces of background information." What would those "less relevant" pieces be? Those would be the 23 unplanned ignitions of methane, which JWR omits to mention occurred in the previous 15 months at the No. 7 mine. From there, JWR notes that most of those prior ignitions were not generated by welding, and that, in any event, no injuries or property damage resulted from them.

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[39](...continued)
at a minute ago." Turner's answer, "[t]o the best of my knowledge, yes sir," was clearly responding only to the second part of the assertion by JWR's Counsel. Tr. 316.

[40] Apart from describing the "ignition" as a "flame," JWR refers to 4th paragraph under 'A' of MSHA's November 2000 Handbook Series, Accident/ Illness Investigations Procedures, where it notes that "[i]n some instances it will be obvious that the conditions are peculiar to the accident site and therefore the Section 103(k) order would not apply to areas other than the accident site." Tr. 314. Here, the distinction is that MSHA's concern was broadly with the large number of ignitions occurring at the mine over a considerable period of time. It's concern was manifestly not limited to ignitions while welding.

[41] Turner acknowledged that when he went to the mine he did not know there already was a 103(k) order on 4 section. Tr. 253.

In fact, taking a remarkable view of those 23 ignitions, JWR believes its "ignition history actually demonstrates how dedicated JWR's personnel are to preventing ignitions . . . ." JWR Reply at 3. By that logic, the extent of JWR's dedication to preventing ignitions would be strengthened if the number of ignitions were to increase further, a head-scratching argument to be sure.

Responding to JWR's (k) order argument, MSHA reminds that it can only issue a (k) order, when present at the mine. Sec. Reply at 3. The Secretary also notes that, aside from 103(k), none of the other provisions[42] of the Mine Act which authorize inspectors to issue orders, include the phrase "when present." Reply at 3-4. As the Secretary notes in her Reply, JWR's claim that MSHA's issuance of "a new (k) order instead of modifying the previous (k) order that was still in effect on the same area" deprived JWR of its right to seek judicial review of the (k) orders, is meritless. This is because MSHA's actions did not deprive JWR of their right under Section 105(b)(2) to seek judicial review of either (k) order. Both (k) orders were modified, and therefor both were available for challenge. The Secretary further notes that the two (k) orders here were issued for *different areas*; one was inby, at the face and attributable to a frictional ignition, while the other, the one directly in issue here, was outby and traceable to a welding ignition. Sec.'s Reply at 7-8. Relying simply upon the fact that the (k) orders addressed different areas, the Court rejects JWR's (k) order argument.

The contention that the agency is required to employ notice and comment rulemaking before it may utilize (j) and (k) orders in the manner used here.

As JWR reads 103(j), MSHA's issuance of that order, oral or otherwise, under that section is "complete unlawfulness." JWR Br. at 9. After offering its analysis of the provision and its reading of the MSHA Handbook (JWR Ex. 13), it maintains "that (j) orders are only authorized when 'rescue and recovery work is necessary.'" JWR Br. at 10. As this decision makes clear the Court is of the view that this is a selective reading of both sources and reaches conclusions completely at odds with the Mine Act's purpose and MSHA's role. While JWR notes that MSHA, since about September 2009, began a new practice of issuing (j) orders orally and remotely, upon receiving an accident notification, it complains that this policy did not undergo notice and comment rulemaking.[43] JWR Br. at 13, JWR Exhibits, 3 & 3 B. However, notice and comment rulemaking applies to "improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines," not for the agency's interpretation of its statutory powers under the mine act. *See*, 30 U.S.C. § 811(a). MSHA's policy regarding Section 103 (j) and (k) do not involve such matters. JWR points to no case law to support its rulemaking claim. Given that notice and comment rulemaking is for the purpose

[42] Orders under Sections 103(j), 104(b), 104(d), 104(e), 104(f) and 107 (a) do not have the "when present" limitation.

[43] Supervisor Shubert agreed that the Agency's use of oral (j) orders was a new policy as of September 2009. Tr. 116.

of promulgating improved safety and health standards, not for the agency's interpretation of its statutory powers under the Mine Act, this claim of JWR is rejected.

MSHA's requirement for miner training

JWR also contends that the training, that is to say the "1 hour" of miner training, was an "abuse of discretion, overly broad and unnecessarily punitive." JWR's Ex 17, the record JWR generated on its own and which was later presented to MSHA showing the training, was offered as "evidence" of what was imposed on JWR. Of course, MSHA does not contest that it required training for the JWR miners at Mine Number 7. Part of JWR's complaint is that, while the ignition on this occasion pertained to a welding related ignition, MSHA required training of all the miners. Tr. 288-289. This represents another instance of JWR's confusion. It is for the Agency, not JWR to determine the scope of those miners in need of ignition training.

In ordering that all miners be trained, Shubert noted that the training was staggered, in the sense that the day shift remained underground but that the evening shift had their training before they went underground to mine.[44] Tr. 178. The same process applied until all were trained. Tr. 179. Thus, the "inconvenience" to coal production, imposed for the purpose of reducing the frequency of ignitions, was minimal.

JWR, again confusing that itself with MSHA, asserts that the modification of the (k) order to require mine-wide training was "overly broad" and therefore an abuse of its discretion.

Here, despite some 23 ignitions at the mine in a 15 month span, JWR's objection involves the agency's modification of the (k) order "to prohibit all underground activity until all of JWR's underground personnel had been retrained on ignition hazard recognition and prevention." JWR Reply at 3. By its lights, even though an ignition was occurring on average about every three weeks, JWR believes that *no* remedial action was necessary, and as it puts it "much less something as sweeping as a production stoppage and mine-wide training." Reply at 3. There were, JWR notes, "no injuries, entrapments, property damage, ongoing emergencies, or conditions requiring rescue and recovery work" and no violations were found. There was, however, the matter of the ignition and regular occurrence of ignitions during the past 15 months.

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[44] Despite a flurry of objections, Shubert was allowed to testify that he later learned about the training and how long it took. He informed that the training took between 30 minutes to an hour and he reaffirmed that the (j) order he issued did not affect the longwall. Instead it impacted the Number 4 section only. This training "covered the recognition of ignitions of miner heads, the bits, worn bits and to be more aware of worn bits, be more aware of when you're burning and welding, monitor the area closely, put out more rock dust in the areas so if you did have a spark that the rock dust would be covered in the foot wall or the floor. Just a basic overall. And then they discussed also that they had numerous ignitions in the past, and this is something we've got to get a handle on." Tr. 181-183.

JWR's reading of Section 103(j) would allow the Secretary to issue a (j) order, only where rescue and recovery work is necessary. JWR Reply at 7. Given that Congress' stated intention under the Mine Act was to protect miners' safety and health, and given the central role that ignitions have played in most mine disasters, it would seem odd that Congress would provide for (j) orders only when that goal effectively has been defeated when the need for rescue and recovery has arisen. JWR's reading would completely emasculate the provision, moving its design from prevention to recovery authority in the wake of a tragedy.[45] In what must be a first for invoking the "remedial" nature of the Mine Act in order to *reduce* its effectiveness, JWR boldly contends that its constrained view of the Secretary's authority under 103(j) will meet Congress' intent "that the Mine Act remain truly 'remedial legislation.'"[46] JWR Reply at 8.

ORDER

For the reasons set forth above, Jim Walter Resources, Inc.'s Notices of Contest, as set forth in the caption, are hereby DENIED and this proceeding is DISMISSED.

SO ORDERED.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

[45] Regarding JWR's frequent citation to *Sec'y of Labor v. Twentymile Coal Co.*, 30 F.M.S.H.R.C. 736 (2008), 2008 WL 4287782, for the proposition that the Secretary's action here lacked a "rational connection" to the facts and choices, JWR Reply at 3-4, 13, the Court obviously finds that there was a rational connection.

[46] In what the Court finds to be a confusing assertion, JWR, again invoking that the Mine Act is "remedial legislation," asserts that the letter and spirit of section 103(j) undermines the Secretary's argument that a (j) order is a *prophylactic* measure. Yet in the same breath that it notes the "sheer lack of the term 'prophylactic' in jurisprudence reflects the Commission's strict adherence to Congress' intent," it then cites five cases in which the term prophylactic is used in Mine Act decisions. JWR Reply 8-9.

Distribution:

David M. Smith, Esq., Maynard, Cooper & Gale, P.C., 1901 Sixth Avenue, North, Suite 2400, Birmingham, AL 35203

Uche Egemonye, Esq., U.S. Department of Labor, Office of the Solicitor, 61 Forsyth Street, SW, Room 7 T 10, Atlanta, Georgia 30303

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-3577/FAX 303-844-5268

January 4, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-325
Petitioner,	:	A.C. No. 11-03054-175456-01
	:	
	:	Docket No. LAKE 2009-326
	:	A.C. No. 11-03054-175456-02
	:	
	:	Docket No. LAKE 2009-435
v.	:	A.C. No. 11-03054-180530-01
	:	
	:	Docket No. LAKE 2009-436
	:	A.C. No. 11-03054-180530-02
	:	
	:	Docket No. LAKE 2009-705
BIG RIDGE, INC.,	:	A.C. No. 11-03054-195111-01
Respondent.	:	
	:	Docket No. LAKE 2009-706
	:	A.C. No. 11-03054-195111-02
	:	
	:	Willow Lake Portal

DECISION

Appearances: Tyler P. McLeod, Esq,, and Francesca Cheroutes, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; R. Henry Moore, Esq., and Jason Webb, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Big Ridge, Inc. ("Big Ridge") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Evansville, Indiana, and filed post-hearing briefs.

Big Ridge operates a large underground coal mine in Saline County, Illinois. The cases involve six section 104(a) citations and four 104(d)(2) orders of withdrawal. The Secretary proposed a total penalty of $116,912 for the citations and orders that were adjudicated.

I. BASIC LEGAL PRINCIPLES

A. Significant and Substantial

The Secretary alleges that the violations discussed below were of a significant and substantial nature ("S&S"). An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). A violation is properly designated S&S, "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3rd. 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec'y of Labor*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the most difficult to apply. The element is established only if the Secretary proves "a reasonable likelihood the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.,* 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.,* 10 FMSHRC 498, 500 (Apr. 1988) (quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). "The Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Cumberland Coal Resources, LP*, 33 FMSHRC __, slip op. at 9, No. PENN 2008-189 (Oct. 5, 2011).

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). The Commission has emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1575 (July 1984). With respect to citations or orders alleging an accumulation of combustible materials, the question is whether there was a confluence of factors that made an injury-producing fire and/or explosion reasonably likely. *UP&L,* 12 FMSHRC 965, 970-971 (May 1990). Factors that have been considered include the extent of the accumulation, possible ignition sources, the presence of methane, and the type of equipment in the area. *UP&L,* 12 FMSHRC at 970-71; *Texasgulf,* 10 FMSHRC at 500-503.

B. Negligence and Unwarrantable failure

The Secretary defines conduct that constitutes negligence under the Mine Act as follows:

> Negligence is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm. Under the Mine Act, an operator is held to a high standard of care. A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety or health of miners and to take steps necessary to correct or prevent hazardous conditions or practices. The failure to exercise a high standard of care constitutes negligence.

30 C.F.R. § 100.3(d) (2011). The Commission has defined an unwarrantable failure as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC,* 52 F. 3d. 133, 136 (7th Cir. 1995). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Docket No. LAKE 2009-325

1. Order Nos. 6675150 and 6675151

On October 28, 2008, MSHA Inspector Larry Morris issued Order Nos. 6675150 and 6675151 under section 104(d)(2) of the Mine Act, alleging violations of section 75.400 and section 75.360(a)(1) of the Secretary's safety standards. Order No. 6675150 states:

> An accumulation of combustible materials, in the form of float coal dust (black in color), coal fines and loose coal, is present at the operating slope tail pulley. The accumulations are in contact with the rotating belt and tail pulley for a distance of approximately 10 feet. The belt was removed from service by

> management when notified by MSHA. The accumulations range from a layer of float coal dust to 16 inches in depth of coal fines and loose coal by approximately 9 feet in width by 20 feet in length. This mine has been issued 8 previous violations for this standard in the last thirteen days. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. GX-1). Order No. 6675151 states:

> An inadequate pre-shift examination was made on the midnight shift on October 28, 2008 on the slope tail piece. Accumulations of combustible materials are in contact with the conveyor belt and tail pulley outby for approximately 10 feet on the East side of the belt. The hazardous condition was noticeable to even the most casual observer. There is no record of any hazards recorded in the examiner's pre-shift record book for this shift on this date. This order is issued in reference to Order #6675150 issued on 10/28/2008. This violation is an unwarrantable failure to comply with a mandatory standard.

(Ex. GX-2). Inspector Morris determined on both orders that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in lost workdays or restricted duty. Further, he determined that both violations were S&S, the operator's negligence was high, and that eight persons would be affected.

Section 75.400 of the Secretary's regulations requires that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." 30 C.F.R. § 75.400. Section 75.360(a)(1) requires that a "certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground." 30 C.F.R. § 75.360(a)(1).[1] The Secretary proposed penalties of $27,959 and $10,705, respectively.

2. Background Summary of Testimony

Inspector Morris has worked for MSHA since January 2007 and is currently a coal mine inspector and accident investigator. (Tr. 1:16).[2] Morris has inspected the Willow Lake Portal on more then 100 occasions since October 2008. (Tr. 1:19). Prior to joining MSHA, Morris worked in the mining industry since 1974. (Tr. 1:17).

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[1] The inspector cited a violation of section 75.360(b). At the hearing, I granted the Secretary's motion to amend the citation to allege a violation of section 75.360(a)(1). (Tr. 1: 6-9).

[2] Citations to "Tr. 1-page number" reference Transcript Volume 1 and citations to "Tr. 2-page number" reference Transcript Volume 2.

On October 28, 2008, Morris was at the mine to perform a required inspection. (Tr. 1:20). During the inspection Morris was accompanied by Bill Shover, who works in the outby areas of the mine and is a safety steward. (Tr. 1:95-96). Morris testified that he started his inspection "at the top of the slope belt and walked it underground." At the tail piece, accumulations were present underneath the belt and visible from the west side of the belt. (Tr. 1:24). At the time Morris arrived the belt was running and the east side of the belt was running in coal for approximately ten feet around the tail pulley. (Tr. 1:24). Morris further testified that accumulations measured approximately nine feet in width, twelve feet long, and sixteen-inches deep. (Tr. 1:24, 1:31). The accumulations consisted of combustible material, coal fines, loose coal, and float coal dust. (Tr. 1:30). The floor of the mine at this location was made of concrete. Some of the accumulations were wet under the surface due to the slope being washed down and water sprays at the belt transfer. (Tr. 1:70-72). Morris testified that the accumulations can dry out and burn in the right conditions. (Tr. 1:32). The slope belt tail, referenced in the order, was in an area with two transfer points from inby belts carrying coal from the mine's working sections. (Tr. 1:33-34). One belt, the 4-A, is on the east and handles two production sections and the other belt, the north, handles the mine's other three production sections. (Tr. 1:33). Morris stated that it took approximately one hour and forty-five minutes for eleven miners to abate the condition. (Tr. 1: 43-44).

Morris determined that the accumulation violation was S&S due to the likelihood of a fire if the accumulations were left in the cited condition. (Tr. 1:35). He reasoned that if the bearings on each side of the tail pulley failed, metal would be in contact with metal, producing frictional heat and igniting the grease and in turn the coal surrounding the bearings. (Tr. 1:35). The slope belt is located in the primary entrance to the mine so that a fire and smoke would affect numerous workers. (Tr. 1:35-36). The main injuries that could occur from this hazard, Morris stated, are respiratory problems from breathing in smoke and getting lost within the mine. (Tr. 1:39-40). Morris further determined that the violations would affect eight workers and could potentially result in lost workdays and restricted duties. (Tr. 1:40). The CO monitors located in the violation area, Morris noted, would not limit the exposure to the hazardous condition because CO monitors often fail and the response by miners can be slow due to complacency. (Tr. 1:42).

Morris further determined that the accumulation violation was an unwarrantable failure because eight previous violations had been issued for the same standard within thirteen days of Order No. 6675150. (Tr. 1:44). These eight preceding violations where all issued by Morris and seven of them concerned accumulations along conveyor belts. (Tr. 1:48-49). Six of these seven violations were S&S because the belt was running and in contact with the accumulations. (Tr. 1:49). Fifteen section 75.400 citations were issued in the mine between October 1 and October 28. (Tr. 1:50). Additionally, Morris stated that the accumulations should have been obvious to an examiner and had existed for some time. (Tr. 1:45-47). Monte Applin, a mine examiner, was in the area at around 5:35 a.m. for the preshift and initialed the date board without referencing any accumulations. (Tr. 1:46). Morris deduced that the accumulations had existed since the belt was shut down during the previous midnight shift. (Tr. 1:47). Morris noted that the mine has three shifts: morning and afternoon production shifts, and a midnight maintenance shift. (Tr. 1:37). Morris explained that by the time the morning shift performed all the required checks, no

coal would have been produced and transported along the belts from the end of the afternoon shift to the time of his inspection the next morning. (Tr. 1:47).

Morris determined that the violation was a result of the operator's high degree of negligence because the operator had been put on notice that it was not consistently complying with section 75.400. (Tr. 1:50). Morris had discussions with the operator after writing his previous eight violations. (Tr. 1:50). Additionally, Morris stated that conditions along the belts were widely ignored. (Tr. 1:50).

Inspector Morris also issued an order for an inadequate preshift examination on the midnight shift on October 28, 2008, based on the same conditions discussed in the accumulations violation above. (Tr. 1:52). Morris testified that the midnight shift examiner typically examined the transfer areas while the examiners on the other shifts usually only walked the west side of the belt, which is why he cited the midnight shift for the violation. (Tr. 1:53-54). In the preshift examination book Applin wrote, "The top entry slope, no methane, 20.9 percent oxygen, no hazardous conditions found" on October 28, 2008 at 5:35 a.m. (Tr. 1:54; Ex. GX-5). In the entry for the dayshift Charlie Hayers, the examiner, wrote "Slope tail dirty" before Morris issued the order. (Tr. 1:55; Ex. GX-5). Morris reasoned that a violation of the examination standard occurred because Applin failed to observe an obvious hazard. (Tr. 1:57). Morris designated the examination violation as S&S because the violation matched the other order and the hazardous condition was allowed to remain unabated. (Tr. 1:57). Morris additionally explained that he designated the examination violation as an unwarrantable failure because the examiner is an agent of the operator and the accumulations were obvious. (Tr. 1:58-59). Morris opined that the examiner should have seen the accumulations, shut the conveyor belt off, and notified the operator. (Tr. 1:59).

On cross-examination, Morris testified that as far as he knew the CO sensors on the belt line were working on October 28, 2008. (Tr. 1:67). In addition, MSHA's standards require that false alarms be treated the same as actual alarms. (Tr. 1:66). Finally, Morris agreed that when the examination books have comments about certain conditions, corrective action is usually undertaken. (Tr. 1:84-85). Morris testified that on October 29, 2008, the day after the orders were issued, Applin spoke with him about recording a note in his personal journal about accumulations on the belt line. (Tr. 1:86-87).

Shover, the safety steward, testified that the slope tail was running in the accumulations, including dry float coal dust, when he arrived with Morris on October 28, 2008. (Tr. 1:96-97). He also recalled the conversation between Morris and Applin in which Applin pulled out his notebook and told Morris that the hazard in question was in his notes; he just forgot to log it in the exam book. (Tr. 1:98). On cross-examination, Shover stated that he stayed at the slope belt while ten to eleven workers spent between an hour and an hour and a half abating the order. (Tr. 1:98-99).

Applin, the examiner, has more than 30 years of experience with five years as an examiner. (Tr. 1:101). He testified that during preshift inspection, at the end of the midnight shift, he walked by the slope tail and looked for any hazards or accumulations. (Tr. 103-104).

Applin stated that he saw the accumulations and went over to two "red hat" miners in the area and told them to clean the slope tail. (Tr. 1:106). Because he assumed that the miners had cleaned the accumulations, Applin did not reference the accumulations in the exam book. (Tr. 1:108). Applin further testified that the accumulations by the tail were mostly wet and he did not see any float coal dust. (Tr. 1:109). He did not consider the accumulations to be a hazard because the accumulations were not touching the belt or rollers. (Tr. 1:107). Applin stated that he did not record the accumulations because he considered accumulations to present a hazard only when the belt is rubbing against them. (Tr. 1:112).

Terry Butler, the belt manager, testified that he accompanied Morris during inspection of the slope tail. (Tr. 1:117). Butler did not walk down the slope with Morris and Shover, but met them at the slope tail. (Tr. 1:117). Butler testified that the accumulations were small and that one had to get down on hands and knees to see the coal that was touching the belt. (Tr. 1:118). Additionally, there was a windrow of coal up the east side of the belt approximately six to eight inches deep and ten feet long. (Tr. 1:118). Butler noted that the accumulations were not obvious and there was no float coal dust at the slope tail. (Tr. 1:119-20). Furthermore, during the termination of the order, Butler testified that eleven workers could not be working at the location at the same time. (Tr. 1:122). On cross-examination Butler clarified the written statement he made regarding October 28, 2008. (Ex. GX-43). Within the written statement Butler references four inches of float dust "on the framing and under the tail." (Ex. GX-43). Butler testified that he was referencing the belt line on the 4A belt and not the slope tail. (Tr. 1:129-130).

3. Summary of the Parties' Arguments

The Secretary argues that Morris established that the operator violated both sections 75.400 and 75.360(a)(1). Section 75.400 was violated due to the presence of float coal dust, a combustible material, within an active working belt area, observed by Morris and further confirmed by both Butler and Shover. (Sec'y Br. 4-5). Section 75.360(a)(1) was violated due to the volume of accumulations on the belt line present early in the morning shift. (Sec'y Br. 5). The Secretary relies on the testimony that the belt in question was started on October 28, 2008, around 6:00 a.m. and only residual coal from the prior days' afternoon shift was on the belt. (Sec'y Br. 5). Morris observed the condition at 7:50 a.m.; thus, the belt was running for less then two hours. (Sec'y Br. 5). The morning production shift starts at 6:30 a.m., and there is an additional time lag for coal to reach the area after the morning shift starts production. (Sec'y Br. 5). The Secretary reasons that the volume of accumulations was so significant that it took around one hour and 45 minutes to clear and this volume could not have been produced solely from the morning shift. (Sec'y Br. 5). Therefore, the accumulations were present for at least one shift and the examiner failed to recognize and record the condition. (Sec'y Br. 5).

The Secretary further argues that the S&S designation on both violations should be affirmed because the cited condition exposed miners to the potential for serious injuries. The accumulations created a fire hazard along a belt line in a common travelway. (Sec'y Br. 6-7). The Secretary contends that the fire hazard existed regardless of the CO monitors referenced by the operators. (Sec'y Br. 7-8). The Secretary also argues that the violation was properly characterized as an unwarrantable failure because the condition was obvious, existed for a

significant time, the examiner knew about the condition, and the operator was on notice for an ongoing accumulations problem. Applin, the examiner, observed the accumulations and should have recorded any maintenance request in the book. (Sec'y Br. 10). Inspector Morris had been having ongoing discussions with management about accumulation problems and the operator had been issued numerous section 75.400 violations. (Sec'y Br. 11). The Secretary states that both past discussions and multiple violations serve to put an operator on notice of a recurring safety problem. (Sec'y Br. 12).

Big Ridge argues that no violation of section 75.360(a)(1) occurred but does not contest the occurrence of the violation of section 75.400. Regarding section 75.360(a)(1), Big Ridge contends that at the time of Applin's examination no hazard existed because the belt was not in contact with any accumulations. (Big Ridge Br. 8-9). At the time of the inspection the contact between the accumulations and the belt was only one square foot. (Big Ridge Br. 9). Thus, the hazardous condition was not in existence for a substantial period of time. (Big Ridge Br. 9).

Big Ridge further argues that the S&S designation was improper for both orders. An injury-causing event was not reasonably likely to occur. (Big Ridge Br. 3). The accumulations were very wet and less likely to ignite; additionally, the inspector confused the presence of float coal dust on the 4A belt with the conditions in the slope tail area. (Big Ridge Br. 3). Methane was also not detected in the area. (Big Ridge Br. 4). Big Ridge further relies on its fire detection systems: CO sensors coupled with fire suppression equipment on the belt line would provide early warning and prevent ignition. (Big Ridge Br. 4). Moreover, Big Ridge relies on Terry Bentley, the MSHA Chief of Health and Safety, and his report on belt entry fires, which states that between 1980 and 2005 there were only 63 reportable fires and no fatalities or lost time ("Bentley Report"). (Big Ridge Br. 5; Ex. R-7). Therefore, the hazardous condition is unlikely to result in any serious injury. Specifically for the violation of section 75.360(a)(1), the S&S designation must be based on the failure to report, not necessarily on the presence of the condition itself. (Big Ridge Br. 9).

Big Ridge also contests the unwarrantable failure designation for both orders. Big Ridge argues that management had no knowledge of a hazard; Applin did not observe accumulations in contact with the belt line. (Big Ridge Br. 7.) Furthermore, the accumulations were limited in scope and not obvious. (Big Ridge Br. 7). Butler testified that the belts were carrying coal during the inspection and the condition was likely created by spillage on the current shift. (Big Ridge Br. 7). The point of contact between the accumulations and belt line was small and could easily be missed by an examiner. (Big Ridge Br. 8).

4. Discussion and Analysis

a. Order No. 6675150

Big Ridge did not contest the violation of section 75.400, but it contends that the Secretary did not establish that the violation was S&S. I agree. The Secretary established the first two elements of the *Mathies* test but did not prove that it was reasonably likely that the hazard

contributed to by the violation would result in an injury. The accumulations were mostly wet. There were no ignition sources in the area that were likely to ignite the coal or cause it to smolder. The belt rubbing in the coal accumulations was not a likely ignition source. There was no evidence that the belt was misaligned, that it was rubbing against the metal supports for the conveyor system, or that any other ignition sources or methane were present. The inspector testified that if the bearings on the tail pulley were to fail, metal would rub against metal and that grinding action could create heat and ignite the grease in the bearings which would ignite the coal. (Tr. 1:35). Such a chain of events, although possible, is unlikely given the facts in this case. There was no showing that the belt was running during the previous maintenance shift. Assuming continuing mining operations, the accumulations would have been cleaned up during the normal mining cycle before an S&S hazard was created. Finally, although the presence of CO detectors and a fire suppression system does not eliminate the hazard, it reduces the likelihood of serious injuries. The violation was serious, however, because if a fire were to break out, a serious injury could result.

Big Ridge also contends that the Secretary did not establish that the violation was the result of its unwarrantable failure. I find that the violation was the result of Big Ridge's unwarrantable failure to comply with the safety standard. The evidence establishes that the violation had existed since the end of the previous production shift. The violation was confined to a small area, but it was in a location where the operator should expect accumulations to develop. All of the coal produced at the mine exits the mine via the slope belt. Several belts dumped onto the slope belt in the area where the order was issued. Consequently, the operator should give special attention to this area to make sure that accumulations are promptly cleaned. I find that Big Ridge had been placed on notice that greater efforts were necessary to comply with section 75.400 throughout the mine and especially along coal-carrying conveyor belts at the mine. Mr. Applin testified that he told some red-hat miners to clean up the accumulations and that he wrote down the conditions he observed in his notepad, but he did not write anything in the preshift examination books. Thus, he was aware that accumulations existed in the cited area. He believed that he was not required to record coal accumulations if the belt was not rubbing in them or, presumably, if there were no other ignition sources present. I do not credit the testimony about the red-hat miners and instead find that Big Ridge made no effort to clean up the accumulations. The accumulations were not readily obvious, but given their location, it was incumbent on the operator to take special care to look for accumulations in the cited area. Big Ridge's conduct amounted to a serious lack of reasonable care. The negligence was high. A penalty of $15,000.00 is appropriate for this violation.

b. Order No. 6675151

Big Ridge contends that the Secretary did not establish a violation of section 75.360(a)(1). I find that a hazardous condition was present at the time of Applin's preshift examination and that he failed to recognize this hazard or record the hazard in the preshift records. As stated above, preshift and onshift examiners have a duty to carefully examine the cited area because it is subject to spillage and accumulations. The examiner must take a moment to thoroughly observe the conditions around the slope tail pulley in order to discharge his obligation to conduct a thorough preshift examination. A cursory walk-though is not sufficient given the likelihood

that accumulations will develop in that location. As discussed above, I found that the accumulations created a serious safety hazard but that they were not S&S. The obligations set forth in section 75.360 to examine for and record hazardous conditions are not limited to those hazardous conditions that are S&S. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14-15 (Jan. 1997).

I also find that this violation was S&S. The preshift examination requirement "is of fundamental importance in assuring a safe working environment underground." *Buck Creek*, 17 FMSHRC at 15. The preshift examination is intended to "prevent hazardous conditions from *developing*." *Enlow Fork*, 19 FMSHRC at 15 (emphasis added). Thus, even though Applin did not consider the accumulation amount to be hazardous at the time of his examination, it was clear that it would not take much more added coal to create a very serious hazard. Thus, the failure to recognize and record the hazard presented a reasonable likelihood that the hazard contributed to by this violation would result in an event in which there was a serious injury.

Whether this violation was a result of Big Ridge's unwarrantable failure is a closer question. As the preshift examiner, Mr. Applin was an agent of Big Ridge and his failure to report the coal accumulation is imputed to Respondent. *Rochester and Pittsburgh Coal Co.*, 13 FMSHRC 195-96 (Feb. 1991). Applin was an experienced examiner. He did not recklessly or intentionally disregard his responsibilities and he was not indifferent to any hazards present. Although Applin believed that the conditions did not present a significant hazard because the coal was damp and the belt was running in only a small section of the accumulations, the operator had been warned a number of times that it was not doing enough to remove accumulations. Both these past warnings and multiple violations of section 75.400 during the weeks leading up to October 28 put the operator on notice that it needed to conduct more thorough preshift examinations in areas where accumulations were likely to develop. The failure of Big Ridge to take steps to retrain its examiners to better identify hazardous accumulations demonstrates a serious lack of reasonable care. Consequently, I find that the Secretary established that this violation was a result of the operator's unwarrantable failure to comply with the safety standard. A penalty of $20,000.00 is appropriate for this violation.

B. Docket No. LAKE 2009-706

1. <u>Citation No. 8417452</u>

On July 20, 2009, Inspector Morris issued Citation No. 8417452 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 75.400 as follows:

> An accumulation of combustible materials, in the form of coal fines and loose coal, is present on the 4F operating conveyor belt at the belt drive. The accumulations are located on both motor trays and under the belt drive and range from 1 to 16 inches in depth by 2-4 feet in width by 1-5 feet in length and are against the motors.

(Ex. GX-38). The inspector determined that an injury was reasonably likely and that lost workdays or restricted duty would be expected if an injury occurred. He further determined that the violation was S&S, the operator's negligence was high, and two persons would be affected. The Secretary proposed a penalty of $16,867.

2. Background Summary of Testimony

Inspector Morris testified that during his regular inspection on July 20, 2009, he observed accumulations of "combustible materials surrounding the drive motor" on the 4F conveyor belt. (Tr. 1:133-34). The 4F belt's drive motors are located on "trays" under the belt. In front of the drive rollers, there are scrapers present to keep accumulations off the motor. (Tr. 1:134). Morris found "coal fines and loose coal on both motor trays and under the belt drive." (Tr. 1:135). Morris measured the accumulations located against the motors to be approximately one to sixteen inches deep, two to four feet wide, and one to five feet in length. (Tr. 1:135). Morris testified that the accumulations were combustible and likely formed because the scrapers were not properly aligned against the belt. (Tr. 1:135).

Morris designated the citation to be S&S because the accumulations were surrounding the motors and close to the couplers, which provide a frictional heat source that could produce an ignition. (Tr. 1:136-37). The resulting fire hazard, Morris reasoned, could produce injuries that produce lost work days or restrict duties because of breathing problems from smoke inhalation or injuries from restricted visibility. (Tr. 1:138). Morris testified that CO monitors and a fire suppression system were located in the area, but he does not take those into consideration because the hazardous condition still exists and safety measures do not always work properly. (Tr. 1:138-39). Morris further states that he personally believes that the most likely place to have a fire in a coal mine is the conveyer belt; he has worked with belts and has been involved with a belt fire before. (Tr. 1:139-40). The violation was also designated as high negligence because Morris had previously met with the management about accumulations on the conveyer belts. (Tr. 1:140-41). Additionally, Big Ridge's history of section 75.400 violations factored into Morris's determination. (Tr. 1:142). Big Ridge shut down the belt and cleaned the area; Morris terminated the citation two hours later on the same day. (Tr. 1:143). Morris estimated that the accumulations had existed for more than three shifts based on his mining experience and the volume of accumulations present. (Tr. 1:143).

On cross-examination Morris testified that he did not take any temperature readings of the belt drive components and the CO sensors were working as far as he knew. (Tr. 1:146-47). Morris also confirmed that the belt fire he had experience with occurred before CO sensors and fire suppression systems were required. (Tr. 1:149). Morris agreed that Big Ridge had fewer section 75.400 violations prior to Citation No. 8417452 than in previous time intervals but he did not feel that this should be a mitigating circumstance in this case. (Tr. 1:150-51). On redirect examination, however, Morris testified that in the first quarter of 2009, twenty-nine section 75.400 violations were issued and in the second quarter ninety-seven section 75.400 violations were issued to the operator. (Tr. 1:153-54; Ex. GX-18).

Bob Clarida, the safety supervisor, testified that he accompanied Morris during the inspection on July 20, 2009. (Tr. 1:162). Clarida described the accumulations as "corn flakes," which are made up of a mixture of fire clay and coal dust. (Tr. 1:162). The accumulations were tested and were determined to be 40% combustible. (Tr. 1:163). Clarida further testified that he did not believe that the accumulations would be reasonably likely to catch on fire because the running temperature of the motors is typically around 120 degrees and the ignition temperature of coal is 881 degrees. (Tr. 1:163-64). On cross-examination, Clarida testified that regarding the numbers he referenced above, the testing had been done a "few years back" and that he never actually examined any of the results. (Tr. 1:165-66).

Todd Grounds, the compliance manager of the Mine, testified as to the operator's programs in place to address section 75.400 violations. (Tr. 1:170). In late January or early February of 2009 a program was put in place to inspect the belt lines above and beyond the regular examination. The program required that both the walkway side and the back side of the belt would be inspected. (Tr. 1:170-71). Additionally, in February of 2009 the operators assigned two additional mechanics to fix hydraulic leaks. (Tr. 1:171). Grounds testified to the positive results of the programs, where May and June of 2009 showed a significant decrease in the number of section 75.400 violations. (Tr. 1:172-73; Ex. R-29).

3. Summary of Parties' Arguments

The Secretary argues that Big Ridge violated section 75.400 when it allowed accumulations of combustible materials around the belt drive motor. (Sec'y Br. 13). The Secretary contends that the violation was properly designated S&S because the accumulations were getting close to an ignition source, which posed a fire hazard. The rotating coupler produces frictional heat and, when material is packed around the motor, a fire hazard results. (Sec'y Br. 13). Smoke from a fire would cause smoke inhalation or injuries from reduced visibility. (Sec'y Br. 14). The Secretary further argues that the presence of fire protection measures does not control whether a safety hazard was present. (Sec'y Br. 14). The Secretary also argues that the violation resulted from Big Ridge's high negligence. Big Ridge was on notice of the accumulations problem because of the previous citations and conversations Morris had with management. (Sec'y Br. 15). Additionally, the Secretary contends that the accumulations had existed for a least three shifts. (Sec'y Br. 15).

Big Ridge does not challenge the violation of section 75.400, but does contest the S&S and high negligence designations. Regarding the S&S designation, Big Ridge argues that the third element of the *Mathies* test was not established; there was no likelihood of an injury-causing event. (Big Ridge Br. 10). Big Ridge relies on Clarida's testimony that the accumulations were mostly non-combustible and the heat generated from the belt drive was not sufficient to ignite coal. (Big Ridge Br. 10). Further, Big Ridge notes that the Bentley report demonstrates that there have been few reportable injuries caused by belt fires in the coal mining industry. (Big Ridge Br. 11-12). Therefore, a belt fire causing an injury is "highly unlikely," and lost time or reduced work is not likely to occur. (Big Ridge Br. 11-12).

4. Discussion and Analysis

The Secretary established a violation of section 75.400. As with Order No. 6675150, above, I find that the Secretary did not establish that the violation was S&S. The third element of the *Mathies* test was not met in this instance. The accumulations were less that 50% combustible; the temperature of the motor was not great enough to ignite the accumulations; it was unlikely that any heat generated by the belt drive would ignite the accumulations; and the CO monitors would have alerted miners if any of the material started smoldering. The risk of an injury from this violation was remote. There was no evidence that the belt motor, the belt, or any other piece of equipment was functioning improperly such that it might become an ignition source. Of course, it was possible that the accumulations could start to smoke, but such an event was not likely taking into consideration continued normal mining operations. I credit the testimony of Bob Clarida on this issue. The gravity of the violation was serious.

I find that Big Ridge's negligence was greater than moderate. I credit the testimony of Inspector Morris that the accumulations had been present for a lengthy period of time. I do not doubt that the mine had been doing a better job of examining its belt lines for accumulations starting in early 2009 or that it reduced the number of citations it has been issued for violations of section 75.400. Nevertheless, the fact that this accumulation had been present for some time demonstrates that Big Ridge's preshift examinations still needed improvement. The negligence was high. A penalty of $10,000.00 is appropriate.

C. Docket No. LAKE 2009-326

1. Citation Nos. 6678829 and 6678835

On September 4, 2008 and September 9, 2008, MSHA Inspector Danny Ramsey issued Citation Nos. 6678829 and 6678835. Both citations were issued under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 75.1722(b). Citation No. 6678829 states as follows:

> The tail roller guard, located on the Unit-5 (5C) conveyer tail piece, was not extended a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. An opening in the guard measuring approximately 5 to 8 inches in width and 24 inches in length was observed exposing the moving tail pulley.

(Ex. GX-9). Citation No. 6678835 states as follows:

> The tail pulley guard, located on the Unit-2 2 (B) conveyor tail piece, was not extended a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the

> belt and the pulley. An opening measuring approximately 3 to 4 inches in width and 24 inches in length was observed exposing the moving pulley.

(Ex. GX-11). On both citations, the inspector determined that an injury was reasonably likely to occur and that the injury would be permanently disabling. He further determined that the violations are both S&S, with Citation No. 6678829 being high negligence and Citation No. 6678835 being moderately negligent. Section 75.1722(b), entitled "Mechanical equipment guards" provides that "[g]uards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley." 30 C.F.R. § 75.1722(b). The Secretary proposes a penalty of $1,795 and $5,961 respectively.

2. Background Summary of Testimony

a. Citation No. 6678829

Inspector Ramsey testified that on September 4, 2008, he was at the mine and traveled with Bob Clarida, the company representative, and Zach Gibbons, the miner's representative. (Tr. 1:192). During the inspection, Ramsey observed an opening on the guarding for the Unit 5 conveyor tail piece. (Tr. 1:179). The opening exposed the moving tail pulley, and was measured to be five to eight inches in width and 24 inches in length, about two-thirds the height of the entire machine. (Tr. 1:179, 184). The guard was made of "belting" and was located "at the end of the conveyor belt where the section feeder . . . unloads onto it." (Tr. 1:179). Ramsey testified that the guarding standard helps prevent miners from reaching behind the guard and exposing themselves to moving mechanical parts, specifically from becoming caught between the belt and the pulley. (Tr. 1:180-81, 182). Miners typically have to reach behind the guards to clean, service, grease, and maintain the tail rollers. (Tr. 1:181-82). The distance between the guard and the moving tail roller was about ten inches. (Tr. 1:182). Ramsey observed debris and wire around the shaft of the tail pulley that was "easily" seen from the opening. (Tr. 1:185). The feeder car on the machine did not provide any protection because the opening was still accessible. (Tr. 1:186).

Ramsey testified that the violation was reasonably likely to cause an injury because the machine was going to have to be cleaned out and people sometimes do not make "smart" choices when working around moving parts. (Tr. 1:187). The violation was likely to result in a permanently disabling injury. (Tr. 1:187). Ramsey determined this from both MSHA guidelines and personal experience; he knew two people who had been injured from reaching into moving machinery. (Tr. 1:188-89). One individual reached into a drive and his arm was pulled off resulting in a fatality, and the other individual had an injury that exposed bone in his arm. (Tr. 1:188-89). Ramsey reasoned that in this particular case a worker would lose function of a limb if caught in a pinch point of the machinery. (Tr. 1:189). Only one worker would be affected because only one can reach within the guard at a time. (Tr. 1:189).

Ramsey further determined that the violation was S&S due to the seriousness of the potential injury, the frequency of people within the area, and the likelihood of occurrence. (Tr. 1:190). Ramsey also determined the violation was due to moderate negligence on behalf of the operator. (Tr. 1:190). The condition was obvious, but Ramsey could not determine how long the condition existed or who knew of the condition. (Tr. 1:190-91). The onshift paperwork did not reference the cited condition at the Unit 5 conveyor tail piece. (Tr. 1:191). Repairing the guard, closing the opening, and securing it with tie wire abated the citation. (Tr. 1:193).

On cross-examination, Ramsey testified that section 75.1722(b) specifically references guarding the point where the belt and roller meet, the pinch point. (Tr. 1:201). The feeder will overlap with the tail piece and bolt onto the machine's frame. (Tr. 1:202). With the feeder on the belt, one would have to crouch and reach in about 20 inches to get to the pinch point. (Tr. 1:207-08). Further, Ramsey testified that most workers would have no reason to reach under the guard; greasers have a hose that extends out of the guard and they have no reason to reach underneath the belt; shovelers use long handled shovels affording them protection; and examiners do not stick their hands under the belt. (Tr. 1:209-10).

Clarida, the safety supervisor, testified that a feeder would make it harder to access the pinch point. (Tr. 1:222). The feeder overhangs the guard by around 24 to 30 inches. Thus, to get a hand in the pinch point, one would have to lie down against the machine; one would not come into contact with the pinch point by merely walking by or working around the area. (Tr. 1:223-24).

b. Citation No. 6678835

Inspector Ramsey testified that on September 9, 2008, he issued another citation for a violation of section 75.1722(b). (Tr. 1:194; Ex. GX-11). The violation was on the Unit 2, 2B conveyor tail piece, and Ramsey measured its opening to be three to four inches in width, 24 inches in length, and exposing the moving tail pulley. (Tr. 1:194). The machine was similar to the machine in the citation above but without the feeder car. (Tr. 1:194). The guarding was made out of belt material, and the gap in the guards was 16 inches away from moving parts. (Tr. 1:194-95). Ramsey reasoned that the belt material used for the guards could easily have been made wider for access. (Tr. 1:196). Miners are around the 2-B tail piece at least once a shift because the mine examiner checks the area, and cleaning as well as maintenance has to be performed. (Tr. 1:195).

Ramsey determined that the violation was reasonably likely to occur because the moving pulley was exposed. (Tr. 1:196-97). Ramsey had issued another citation for accumulations around the tail piece and within the opening; therefore, someone had to be in the area to clean. (Tr. 1:197). The violation was also determined to likely result in a permanent or disabling injury and would affect one person for the same reasons as Citation No. 6678829, above. (Tr. 1:198).

Ramsey further determined that the violation was S&S because, if left unabated, a serious injury would result. (Tr. 1:198). Ramsey determined that the operator displayed a high level of negligence because the operator knew or should have known about the violation and there were

no mitigating circumstances. (Tr. 1:198). After Ramsey issued Citation No. 6678829, above, on September 4, 2008, he stated that he gave Clarida a verbal notification that he would raise the level of negligence in the next citation he issued for a violation of the guarding standard. (Tr. 1:198).

Clarida testified that the setup of the tail piece is similar to the citation above, but no feeder was located on the belt line. (Tr. 1:226). He believes that any potential injury would not result in a permanent and disabling injury, and that one would have to deliberately stick a hand in the opening for an injury. (Tr. 1:227). Clarida states that he believed Ramsey did speak with him about the guarding violations but could not remember for sure. (Tr. 1:228).

3. Summary of Parties' Arguments

The Secretary argues that Big Ridge violated section 75.1722(b) as set forth in both citations because a gap was allowed in the unsecured guarding on the Unit 5C and 2B tail pieces, respectively. The regulation requires that a guard be present to prevent reaching behind and becoming caught. (Sec'y Br. 17). A sufficient distance for moving parts would be approximately 30 inches or the length of a man's arm. (Sec'y Br. 17). The Secretary contends that Citation No. 6678829 was properly designated S&S and moderately negligent. The S&S designation was proper because an injury was reasonably likely to occur because miners frequently traveled in the area, and clean up would have to be done in the near future in the area as well. (Sec'y Br. 17). A moderate negligent designation is also appropriate because the condition was obvious and the area is examined once a shift. (Sec'y Br. 18). The Secretary rejects Big Ridge's argument that section 75.1722(b) only requires guards against the pinch point between the belt and tail pulley and guards only need to protect miners from accidental contact. (Sec'y Br. 18-19). The language and intent of the regulation focuses on a miner deliberately reaching through an inadequate guard and is not limited to just one particular pinch point. (Sec'y Br. 18-19). The Secretary also contends that Citation No. 6678835 was properly designated S&S and moderately negligent. The S&S designation was proper because it was reasonably likely that an injury world occur because accumulations had to be cleaned up around the tail piece. (Sec'y Br. 19-20). The designation of high negligence by the operator is also appropriate because Ramsey had previously given notice to Big Ridge about guard violations. (Sec'y Br. 20).

Big Ridge first argues that no violations of section 75.1722(b) occurred. The guards in place were sufficient to prevent contact where the belt and pulley meet. (Big Ridge Br. 15). The guard in Citation No. 6678829 did not permit access to the pinch point located 20 inches from the guard, and the pinch point was further protected by the feeder. (Big Ridge Br. 16). Citation No. 6678835 was similar in that the guard did not permit access to the pinch point and one would have to lie on the ground to access the area. (Big Ridge Br. 16). A miner could not slip or trip and be placed in a position to contact the pinch point. (Big Ridge Br. 17). If both guarding violations did occur, Big Ridge argues that both should not be designated S&S. The S&S designation is improper because there was no likelihood of an injury-causing event, the third element of the *Mathies* test. (Big Ridge Br. 17). An injury is unlikely because of the location of the pinch point and the presence of the guard. (Big Ridge Br. 17). Anyone

performing work on the belt line was required to lock out and tag out the line, and travel by the belt would not cause contact with the pinch point. (Big Ridge Br. 18). Furthermore, Big Ridge contests the high negligence designation on Citation No. 6678829, because no conversation between Ramsey and Clarida ever took place regarding guarding violations on September 4, 2008. (Big Ridge Br. 18). If the conversation did occur, mitigating circumstances were still present because the guards present prevented all but deliberate conduct. (Big Ridge Br. 19).

4. Discussion and Analysis

Section 75.1722 is a very important safety standard. It requires that moving machine parts be guarded to prevent miners from becoming entangled in these moving parts and sustaining severe injuries. Unguarded or inadequately guarded moving machine parts present a significant hazard to miners. This safety standard is essential because miners, in conducting their day-to-day activities, should not be exposed to the hazards presented by moving machine parts. As the Commission stated in *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984), guarding standards should be interpreted to take into consideration a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . ." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

Nevertheless, I am bound by the terms of the safety standard that is cited. In this case, the inspector cited section 75.1722(b) which provides that "[g]uards at conveyor . . . pulleys shall extend a distance sufficient to prevent a person from reaching *behind the guard* and becoming caught *between the belt and the pulley*." (emphasis added). This standard was drafted narrowly to protect a miner from reaching behind a guard and getting caught between a belt and a pulley. It does not cover the hazards related to other moving machine parts, such as gears, sprockets, chains, flywheels, or similar moving machine parts. Consequently, the issue is whether the two conditions cited by Inspector Ramsey presented a hazard of getting caught between the belt and the pulley.

With respect to the first citation, Inspector Ramsey testified that it was possible to reach underneath the belt guarding and come in contact with the pulley. (Tr. 1:186). The point where the belt rolls onto the pulley was about four to six inches above the ground. (Tr. 1:202). Someone would have to reach in to contact the pulley and that person would have to be crouching. (Tr. 1:206). The inspector estimated that it was about 20 inches from the bottom of the guard to the subject pinch point. (Tr. 1:207). There was also a gap between the pieces of belting that were being used as a guard. (Tr. 1:208).

With respect to the second citation, Inspector Ramsey testified that it was about 16 inches between the guard and the pulley. (Tr. 1:195). As with the previous citation, because the guard was made of hanging pieces of belting, a miner could push them aside. (Tr. 1:196). There were accumulations behind the guarding. (Tr. 1:197).

I find that the Secretary established a violation in both instances. The belting used as guarding was not secured in such a way to prevent a miner from coming into contact with the pinch point between the pulley and the belt. Miners were in the area once a day to perform examinations and to perform routine maintenance. Based on the testimony of Inspector Ramsey, I find that there was a "reasonable possibility of contact and injury" with the pinch point between the belt and the pulley. The guarding material was somewhat flexible and there were gaps in the guarding with the result that a miner's hand or clothing could get caught in the subject pinch point.

I find that the violations were not S&S, however. The two pinch points were very low to the ground and were a considerable distance behind the existing guards. Although an injury was possible as a result of the cited conditions, it was not reasonably likely that anyone would be in a position to become entangled in the cited pinch points. As a consequence, it was not reasonably likely that the hazards contributed to by the violations would result in an event in which there was an injury. A person would have to be very low to the ground and reach up under the existing guards. Even then, it would not be very likely they would be injured at the pinch points because they were 20 inches or so beyond the guard. The gravity of the citations was low.

I find that the negligence for Citation No. 6678829 was low. Given the position of the pulley and presence of the feeder, it was not readily obvious that additional guarding was required under the safety standard. The negligence for Citation No. 6678835 is moderate. I credit the testimony that Inspector Ramsey discussed the need to provide more substantial guards at tail pulleys. A penalty of $1,000.00 is appropriate for Citation No. 6678829 and a penalty of $4,000.00 is appropriate for Citation No. 6678835.

D. Docket No. LAKE 2009-435 and LAKE 2009-436

1. Order No. 6683115 and Citation Nos. 6683116 and 6683117

On February 23, 2009, Inspector Scott Lee issued one order and two citations. The citations and order were issued at the same location along the slope belt. Order No. 6683115 was issued under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.362(b) as follows:

> An inadequate exam was performed on the slope belt on the 2nd shift on 2/23/2009. A frozen bottom roller acting like a scraper approximately 30 ft. outby the slopes tail piece was observed with accumulations of combustible material in the form of coal fines underneath it. The fines were approximately 6ft. in width, 5ft. in length and 25 inches in height, (touching the bottom belt) and were packed around the roller on its inby side. The onshift examiner had just walked this belt approximately 45 mins. prior to this inspector observing this condition. Based upon this inspector's experience this condition had been present for at least one shift. After the cited roller was removed a flat spot 47 inches in length

> and 2 inches wide was measured on the roller, another indication that the condition had existed for some time prior to the examination. To abate the order all examiners will have to be retrained on how to examine a belt line properly.

(Ex. GX-13). The inspector determined that an injury was reasonably likely to occur and that the injury could be expected to result in lost workdays or restricted duty. He further determined that the violation was S&S, the company's negligence was high, and three persons were affected. Section 75.362(b), entitled "On-shift examination," provides in part that "[d]uring each shift that coal is produced, a certified person shall examine for hazardous conditions along each belt conveyor haulageway where a belt conveyor is operated." 30 C.F.R. § 75.362(b). The Secretary proposes a penalty of $6,624.

Citation No. 6683116 was issued under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. 75.1725(a) as follows:

> A frozen bottom roller was observed approximately 30 ft. outby the slope belt's tail piece. Accumulations of coal fines were packed around it on its inby side. This condition should have been observed by the on shift examiner during his examination approximately 45 minutes prior.

(Ex. GX-14). The inspector determined that an injury was reasonably likely to occur and that the injury could be expected to result in lost workdays or restricted duty. He further determined that the violation was S&S, the company's negligence was high, and three persons were affected. Section 75.1725(a), entitled "Machinery and equipment; operation and maintenance" provides that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." 30 C.F.R. § 75.1725(a). The Secretary proposes a penalty of $9,634.

Citation No. 6683117 was issued under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. 75.400 as follows:

> Accumulations of combustible material in the form of coal fines was allowed to accumulate and make contact with a bottom frozen roller. The accumulations measured approximately 6ft. in width, 5ft. in length and 25 inches in height. This condition was observed approximately 30 ft. outby the slope belt tail piece.

(Ex. GX-15). The inspector determined that an injury was reasonably likely to occur and that the injury could be expected to result in lost workdays or restricted duty. He further determined that the violation was S&S, the company's negligence was high, and three persons were affected. The Secretary proposes a penalty of $18,271.

a. Background Summary of Testimony

Inspector Lee testified that on February 23, 2009, he was inspecting the slope belt of the mine. (Tr. 1:238, 240) Lee has worked as an MSHA inspector for eleven years and has over 35 years of experience in the mining industry. (Tr. 1:235). The location of the violation on the slope belt was approximately 30 to 40 feet outby the location Inspector Morris cited in Order No. 6675150. (Tr. 1:240). Lee had decided to spot check this area because he had issued an order in the area a few weeks prior and to double-check the examiners who preshifted the slope belt thirty minutes earlier. (Tr. 1:240-41). Walking the belt line Lee saw accumulations under a roller from 30 to 40 feet away. (Tr. 1:241). The accumulations were touching the bottom of the belt and measured 25 inches in depth. (Tr. 1:241-42). Accumulations were observed on both sides of the roller with more on the outby side because the frozen roller was acting as a scraper on the return side of the belt. (Tr. 2:4-5). Lee testified that he observed the belt running and the roller not turning with the accumulations packed around the roller. (Tr. 1:242-43). Lee measured the accumulations to be approximately five feet in length and five feet in width, confined in the area around the roller. (Tr. :244-45, 247). The accumulations consisted of moist coal fines that had the potential to dry out. (Tr. :247). Inspector Lee issued one order and two citations based on the conditions he observed. (Tr. 1:246-47). Lee further testified that, based on his experience, the accumulations had been present for at least one shift because of the volume present. (Tr. 1:248). Lee reasoned that an examination on the belt line was performed around 45 minutes before his inspection at 3:45 p.m., and the next examination would not have been performed until six o'clock the next morning. (Tr. 1:249-50, 2:9).

Regarding Order No. 6683115, the inadequate exam violation, Lee testified that he designated it as S&S because there was an ignition source present. (Tr. 1:251). Lee reasoned that the "frozen" roller created a heat source that could ignite the coal fines and start a fire. (Tr. 1:251, 1:255). The roller was warm to the touch, but the exact temperature was not measured. (Tr. 1:251). Lee described the roller as flat on one side where the belt had been rubbing and was measured to be two inches wide and 47 inches long. (Tr. 1:251-52; Ex GX-16). The slope belt is along a main travel road, where smoke from a fire would affect anyone on the travel road. (Tr. 1:257). According to Lee, the hazard would be reasonably likely to occur because no one would be in the area to observe a fire. (Tr. 1:257-58). Lee further stated that the above characterization also applied to his designation of Citation No. 6683116, the machinery violation, and Citation No. 6683117, the accumulations violation, as S&S. (Tr. 2:10).

Lee further testified that he designated the violation in Order No. 6683115 as an unwarrantable failure because the condition was obvious. (Tr. 2:10). Lee did not have to kneel down to see the accumulations and the slope belt is the primary hazard area within the travel way. (Tr. 2:11). A few weeks beforehand, Lee issued an order for a similar issue: accumulations had built up around bottom rollers on the same slope belt and an exam was performed 40 minutes prior. (Tr. 2:12). The operator had been made aware of problems with examinations by MSHA; three or four inadequate exam violations had previously been issued. (Tr. 2:12-13). Lee determined, based on his experience, that the accumulations had existed for a period of time because of the amount compacted around the roller. (Tr. 2:13). In Lee's opinion, the accumulations existed when the examiner examined the slope belt 45 minutes prior to Lee's

inspection. (Tr. 2:14). Lee further designated the order as high negligence because there were no mitigating circumstances; the examiner did not deal with the accumulations properly. (Tr. 2:16). The order was abated after the examiners were given additional training concerning reporting hazardous conditions. (Tr. 2:21).

Lee testified that he issued Citation No. 663116, the machinery violation, because the roller was not turning, which was evident by the flat spot on the roller. (Tr. 2:14). When the roller was taken out, the bearings were still working. (Tr. 2:14). Lee testified that when the accumulations became packed around the roller, the roller could no longer turn. (Tr. 2:14). Lee also designated this violation as high negligence for the same reasons as the inadequate exam violation above. (Tr. 2:17). Lee prepared the closeout report for the mine in March 2009, and section 75.400 violations had increased from the previous quarter. (Tr. 2:20). The belt was shut down and the roller was removed to abate this citation. (Tr. 2:22).

Inspector Lee issued Citation No. 6683117 because combustible material had accumulated around the slope belt. (Tr. 2:17). The violation was determined to be high negligence because approximately 60 section 75.400 violations had been issued since the first of the year. (Tr. 2:18-19; GX-17). The accumulations were shoveled and removed from the mine to abate this violation. (Tr. 2:22).

On cross-examination, Lee admitted that some of the citations issued in January 2009 had been vacated by a judge. (Tr. 2:23-24). Additionally, the closeout report only references categories of violations and not specific section violations. (Tr. 2:24). CO sensors were also located on the slope belt. (Tr. 2:33). Lee testified that he was traveling with Mike Cummins, the union representative, and Cliff Kanady, the safety manager, while performing his inspection. (Tr. 2:37).

Kanady testified that he has 40 years of mining experience and traveled with Inspector Lee in February 2009. (Tr. 2:43-44). Kanady did not notice any violations on the belt line until Lee showed him the frozen roller. (Tr. 2:45). The accumulations were not noticeable until Kanady "stooped over a certain amount;" the accumulations were on the outby side but not against the belt. (Tr. 2:46). Kanady testified that he considered the belt line to be clean and the walkway to be clear. (Tr. 2:47; Ex. R-5). On cross-examination, Kanady testified that he thought the roller looked new because it was still painted. (Tr. 2:51, 53).

Ronnie Hughes, mine manager, testified that he went to the cited area shortly after the order and citations were issued. (Tr. 2:57). The belt mechanic and Cummins were changing out the roller, with accumulations on the inby side. (Tr. 2:58). Hughes took photographs of the area during this time. (Tr. 2:59; E. R-6). Photograph 6A shows the flat spot on the roller, with paint still on the roller. (Tr. 2:59-60; Ex. R-6A). Hughes reasoned that the roller had never turned and did not know when the roller was installed, but during the midnight shift the belts are not running and the maintenance crew changes out rollers. (Tr. 2:60). Photograph 6B shows the roller still in the hangers from the outby side, with the belt on the right side. (Tr. 2:61). Photograph 6C is from the same perspective as 6B, with Hughes testifying that he was on his knees, bent over at the waist taking the photograph. (Tr. 2:62). Photograph 6D shows the roller

from the inby side with accumulations shown. (Tr. 2:63). Photograph 6E is taken from the same perspective as 6D. (Tr. 2:63). According to Hughes, the accumulations were wet and damp. (Tr. 2:63). Photograph 6F shows Cummins helping the belt mechanic change the roller, with the top belt in view. (Tr. 2:64). Hughes states that the bearings were free on the roller after removal, but the accumulations were not packed around the bearings. (Tr. 2:65-66). At the time Hughes arrived at the violations to take photographs, he did not observe anybody shoveling in the area. (Tr. 2:68).

On cross-examination, Hughes testified that the bottom belt was around 24 inches from the ground. (Tr. 2:69). Hughes agreed that it was easier to see under the belt from a distance due to the slope of the floor. (Tr. 2:70). Hughes stated that the accumulations were "shaped like a pyramid with the bottom approximately four [feet] across and the point touching the roller and the belt." (Tr. 2:70). He could not tell if any accumulations had already been removed by the time he arrived. (Tr. 2:71).

Scott Lawrence, the section foreman in February 2009, testified that he accompanied Hughes underground to the cited area. (Tr. 2:78). Lawrence stated that he could not see any accumulations until he got down on his knees to look underneath the belt. (Tr. 2:79). When he and Hughes arrived, miners were in the area working to raise the belt off the roller in order to change out the frozen roller. (Tr. 2:79-80). Lawrence testified that he believed the roller froze within a shift or half a shift because a flat spot does not take long to develop. (Tr. 2:81). The roller still had paint on it, suggesting that the roller never turned because paint would be gone in about an hour of use. (Tr. 2:82). The accumulations consisted of coal fines that were wet and damp. (Tr. 2:82). On cross-examination, Lawrence agreed that it was possible that accumulations could have caused the roller to freeze, but in this case the accumulations were not compacted even though accumulations were attached to the roller. (Tr. 2:85-86).

Dennis Morris, the mine examiner in February 2009, testified that he onshifted the slope belt on February 23, 2009, around 3:00 p.m. (Tr. 2:90, 92, 96). Morris stated that he would walk the west side of the belt and every 60 to 80 feet he would get down on his knees and look under the belt. (Tr. 2:91). During the examination Lawrence noted, "carbon flakes and fines under belt, top to bottom" in the record book. (Tr. 2:93; R-2). Lawrence stated that he did not observe the condition that Inspector Lee wrote up. (Tr. 2:93).

Charlie Hyers, mine examiner, testified that around 7:00 a.m. on February 23, 2009, he was on the day shift and examined the slope belt. (Tr. 2:103). Hyers remembers the roller in question because it was brand new and bright red, and it was turning at the time of his examination. (Tr. 2:104). Hayes also stated that it is not uncommon for a roller to stop turning on a belt and a flat spot would not take long to form because of the thickness of the slope belt. (Tr. 2:105).

Chad Barras, the Midwest regional safety director for Peabody Energy, testified that he is familiar with the above violation types from the training he received while he was a ventilation inspector for MSHA. (Tr. 2:115). As part of Barras's current job with Peabody, he reviews MSHA and industry reports as well as reports from the mines in his region. (Tr. 2:114-15).

Barras stated that he is familiar with the Bentley Report regarding the MSHA study on belt fire injuries. (Tr. 2:116; Ex. R-7). In the Bentley Report, from 1980 to 2005 there were no fatalities and no lost time from belt fires. (Tr. 2:117-18). The mine had fire protection systems located along the belt line consisting of CO systems, fire suppression systems, and belt slip detection systems that cannot be turned back on remotely. (Tr. 2:118-19). Barras also testified that the ignition temperature of processed coal at the mine is 880 degrees Fahrenheit and unprocessed coal or wet coal would raise the ignition temperature. (Tr. 2:119-20). Peabody has tested samples of "corn flakes" along the belt line in mines that it operates. When this material was tested at the Willow Lake Mine, it was 40% combustible. (Tr. 2:121). Additionally, Barras has used heat guns to determine operating temperatures of mining equipment. (Tr. 2:121). Belt rollers were measured to typically operate around 80 degrees Fahrenheit, with data showing a maximum temperature around 180 degrees Fahrenheit. (Tr. 2: 122). Barras testified that he believes Inspector Lee's determination that each violation was reasonably likely to result in an injury is not correct. (Tr. 2:122). The accumulations were wet, the machine temperatures could not have been around 800 degrees Fahrenheit and fire protection systems were in place along the belt line. (Tr. 2:123-24). On cross-examination, Barras testified that on one occasion the mine had been cited for a fire suppression violation when the water within had been turned off. (Tr. 2:129-30). After the Bentley Report was issued in 2005, a belt fire occurred where two miners got lost in a belt fire and died. (Tr. 131).

b. <u>Summary of Parties' Arguments</u>

The Secretary argues that the evidence established that sections 75.362(b), 75.1725(a), and 75.400 were violated. Coal accumulations were clearly visible to Inspector Lee and these accumulations had existed for more then a shift because the coal was packed around the belt roller. (Sec'y Br. 21-22). The belt roller was not in a safe condition because the roller was "frozen," causing more accumulations and frictional heat. (Sec'y Br. 22). An examiner had also walked the belt line with the conditions present but did not take any action. (Sec'y Br. 22). All three violations are S&S because two ignition sources were present: (1) frictional heat between the belt and the frozen roller, and (2) frictional heat between the accumulations against the belt. (Sec'y Br. 23). The frozen roller had been "flattened" on one side from the belt line and was warm to the touch. Additionally, the accumulations were pressing against the running belt. These conditions would have continued to exist for a significant period of time because no one was working in the area and the next examiner would not have walked by until the next day. (Sec'y Br. 24). A fire was reasonably likely to occur due to these conditions. (Sec'y Br. 24). The examiner's failure to record the hazardous condition exposed miners to injuries from a belt fire. (Sec'y Br. 24).

The inadequate examination violation was properly designated as an unwarrantable failure and the accumulations and equipment violations designated as high negligence because the condition was "extensive, obvious, posed a high degree of danger, existed long enough for miners to be exposed to the danger, and the mine had been placed on notice." (Sec'y Br. 25). Lee walked the belt line no more than 45 minutes after the examiner and the conditions likely existed when the examiner had been there because of the volume of accumulations. The belt roller also had a flat spot on it, indicating that the roller had been frozen for some time. The

condition was obvious because Lee observed the accumulations from 30 to 40 feet away. The operator had been on notice to more quickly remove accumulations on the slope tail belt due to previous citations and verbal communications by MSHA inspectors.

Big Ridge contends first that no violation for section 75.362(b) occurred because no hazardous condition existed for an examiner to report. (Big Ridge Br. 21). Morris, the operator's examiner, did not observe any contact between accumulations and the belt or observe any frozen rollers. Coal flakes were noted for further action in the record, but generally the operator's examiners performed an adequate exam by walking the entire belt line, stopping every 60 to 80 feet to look under the belt line with a cap light. Next, Big Ridge contends that the finding of an unwarrantable failure was inappropriate. (Big Ridge Br. 23). The condition was not obvious or extensive. The accumulations did not reach into the walkway and were only five feet wide and two feet high. Also, during the examination, the frozen roller, painted red, was not observed. The condition did not present a high degree of danger because the accumulations were wet, the roller was not hot, and the belt line had a working fire suppression system. Therefore, no aggravated conduct was present by the operator.

The designation of all three violations as S&S is also contested by Big Ridge because an injury-causing event was unlikely to occur. (Big Ridge Br. 25). The accumulations were neither extensive nor dry, making ignition difficult. The accumulations were mostly comprised of non-combustible material and no methane was present. If a fire were to occur, the presence of fire detection and suppression systems would reduce the spread of a fire and the likelihood of an injury. Big Ridge finally contests the high negligence designations of the accumulation violation and the equipment violation. (Big Ridge Br. 26). The section 75.400 violation was small in size, not obvious, and underneath the belt. The walkway within the area of the violation was narrow, four feet wide, and was not well lit. Finally, it was unclear when the conditions developed.

c. <u>Discussion and Analysis</u>

For the following reasons, I affirm Order No. 6683115 in all respects. Big Ridge violated section 75.362(b) because the on-shift examination was clearly inadequate. I credit the testimony of Inspector Lee as to the conditions he found. Based on the evidence presented at the hearing, I find that these conditions were a "hazardous condition," as that term is used in the safety standard. This standard specifically directs mine operators to examine each belt conveyor haulageway and this particular belt haulageway is used to transport all of the coal out of the mine. I further find that these conditions were obvious and should have been discovered by the on-shift examiner. Inspector Lee saw the accumulations from a distance of about 40 feet. This examiner passed through the area about 45 minutes prior to the time Inspector Lee observed the condition. I find that the credible evidence demonstrates that the conditions had not changed significantly in those 45 minutes.

Conducting adequate pre-shift and on-shift examinations is crucial to maintain a safe environment in underground coal mines. On that basis I find that the violation was serious and S&S. Failure to perform adequate workplace examinations creates a measure of danger to safety that is reasonably likely to contribute to a hazard that will result in an injury of a reasonably

serious nature. In this instance, coal fines were present that were 25 inches high in some places and were packed around the frozen roller. This condition created a significant safety hazard that should have been noted by the examiner and addressed by the operator. As stated above, I credit the testimony of the inspector as to the conditions he observed.

I also find that Big Ridge was highly negligent and that the violation was the result of its unwarrantable failure to comply with the safety standard. Inspector Lee had issued an order for a similar condition in the same general area along the slope belt a few weeks earlier. In addition, as discussed above, Inspector Morris issued an order for a violation of section 75.360(a)(1) along the slope belt on October 28, 2008. The operator had been placed on notice that its examiners need to perform examinations that are more thorough and comprehensive. The violation was obvious and it had existed for at least a shift. Big Ridge exhibited a serious lack of reasonable care with respect to this violation. A penalty of $20,000.00 is appropriate.

With respect to Citation No. 6683116 alleging a violation of section 75.1725(a), I find that the Secretary established a serious violation. It is clear that a roller was frozen about 30 feet outby the tail piece for the slope belt. Because it was frozen, it acted as a scraper and coal fines accumulated around the roller and also fell to the floor under the roller. It was this frozen roller that created the accumulation. I find that the condition had existed for some time because the belt had worn down the metal on the roller to the extent that there was a two-inch wide flat spot on the roller that extended almost the width of the belt. The remainder of the roller was still covered with paint. In all likelihood the roller had never turned or, if it turned at all, it did so for a very short period of time. I conclude that this equipment had not been maintained in a safe operating condition and it was not removed from service.

I find that the operator's negligence was moderate. The evidence establishes that the cited condition was due to unusual circumstances. Given that the roller was still covered in paint, it is more than likely that it failed long before one would expect and the roller may not have ever functioned properly. When tested after it was removed from service, the bearings worked and the roller turned. Although examiners are expected to look for defective rollers, I hold that the failure of the operator to replace or repair this roller did not amount to high negligence.

With respect to Citation No. 6683117 alleging a violation of section 75.400, I find that the Secretary established the violation and that Big Ridge's negligence was high. As stated above, a competent on-shift examination should have discovered this violation and the accumulations should have been removed. The conditions were rather obvious.

Whether Citation Nos. 6683116 and 6683117 were S&S is a closer question. The temperature at which the coal at this mine will ignite is rather high. I credit the testimony of Mr. Barras on this issue. Although the frozen roller was warm, it was unlikely that it would have gotten hot enough to ignite the coal fines, assuming continued mining operations. In addition, a high percentage of the accumulations were incombustible. Mr. Barras credibly testified that the combustible content of material that sticks to rollers at the mine is about 40%. (Tr. 120-21). The CO monitoring system and fire suppression system would activate in the event the accumulations started to smolder. I find that these two violations were not S&S. It was not

reasonably likely that the hazard contributed to by the violations would result in an injury. It was unlikely that anyone would suffer a serious injury as a result of the violations, assuming continued mining operations. The violations were serious, however, because, in the event a fire started and all of the fire suppression systems failed, one or more miners could suffer from smoke inhalation.

A penalty of $8,000 is appropriate for Citation No. 6683116 and a penalty of $12,000.00 is appropriate for Citation No. 6683117.

2. Order No. 6683119

On February 26, 2009, Inspector Lee issued Order No. 6683119 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.360(a)(1)[3] as follows:

> An inadequate exam was made of the main north intake/primary escape way for the south side of the mine. One roof bolt had fell out of the roof exposing an area 8 ft. in width by 9½ ft. in length. This area was immediately adjacent to the lifeline. It was evident by at least one set tire tracks from the examiner's ride on top of the fallen rock, (which resulted from the missing roof bolt) that this condition had existed for at least one shift. Other tire tracks in the cited area indicated that the examiners had been driving around this exposed area of unsafe roof for some length of time. There was no record of this hazardous condition in the mine record books.

(Ex. GX-21). The inspector determined that an injury was highly likely to occur and that the injury would be permanently disabling. He further determined that the violation was S&S, the company's negligence was high, and one person was affected. The Secretary proposes a penalty of $17,301.

a. Background Summary of Testimony

Inspector Lee testified that on February 26, 2009, at 8:15 in the morning he issued Order No. 6683119 because he observed a roof bolt on the ground with fallen rock around in a travel area of the mine. (Tr. 2:136-37). He observed tire tracks on the ground change from the original pathway to avoid the debris on the ground. (Tr. 2:137). Additionally, there were tire tracks on top of the debris showing someone had driven over the top of the rocks. (Tr. 2:137). Some of the tracks went around these rocks. From this evidence Lee determined that the condition had existed for some time and an examiner would have been through the area with the condition

[3] A few days before the hearing, the Secretary moved to amend Order No. 6683119 to change the safety standard alleged to have been violated from section 75.362(b), as written by Inspector Lee, to section 75.360(a)(1). (*see* Tr. 1:6-9). The Secretary's motion to amend is hereby **GRANTED**.

present. (Tr. 2:138). The area in question is in the main north intake primary escapeway, 74 crosscut. (Tr. 2:139, 141). Lee described the condition as a 36 to 48 inch long roof bolt lying on the ground with about an eight to nine foot diameter area of rock, six to eight inches deep that fell from the roof. (Tr. 2:139-40). The roof bolt was a grouted type bolt. (Tr. 2:140). Lee testified that he did not see any flagging in the area and no tire tracks from heavy machinery were around. (Tr. 2:142, 145). Lee stated that an examiner would typically need to flag the condition and record it. (Tr. 2:144). This particular area did not see a lot of traffic, Lee noted. (Tr. 2:144). Also, the area was preshifted by examiners every shift because it was part of the route to get to the seals. (Tr. 2:146-47). Lee testified that he issued the order under the wrong standard, and the standard should have been under section 360(a)(1). (Tr. 2:151). Section 360(a)(1) requires that examinations occur in any location where miners are going to travel or work. (Tr. 2:152). The roof bolt was required as part of the Mine's roof control plan. (Tr. 2:154).

Lee further testified that he determined that the condition was highly likely to result in an injury because the hazard was not properly dealt with, though the area has no known history of roof falls. (Tr. 2:155). The injury was designated as potentially permanently disabling because of the potential for large pieces of falling rock. (Tr. 2:156). The violation was designated as S&S because the roof system was weakened by the removal of a roof bolt and a lifeline is adjacent to the condition. (Tr. 2:156). The operator's negligence was determined to be high because of previous inadequate exam violations in the quarter. (Tr. 2:157). Lee himself had written three to four inadequate exam violations within the quarter. (Tr. 2:160). Lee testified that every time that he had issued an inadequate exam violation he spoke with the operators. (Tr. 2:157). To abate the order mine management retrained the examiners on recognizing hazards. (Tr. 2:158). The violation was characterized as an unwarrantable failure because the condition was obvious and the operator knew it was having troubles with examinations. (Tr. 2:162). When Lee looked at the preshift paperwork, there were no notes regarding the fallen roof bolt. (Tr. 2:162). Lee spoke with Bart Schiff about the order and discussed the problems of inadequate exams. (Tr. 2:168). On cross-examination, Lee testified that the violation area was not a travelway but an intake and workers would typically not be in the area. (Tr. 2:171). Additionally, the area is not an active working section of the mine. (Tr. 2:178). The violations Lee relied on had not become final, and some subsequently had been vacated. (Tr. 2:179:80).

Schiff, the mine safety manager, testified that he had accompanied Inspector Lee on February 26, 2009. (Tr. 2:191). He was not with Lee when the condition was first encountered, but observed a roof bolt "sheared off" and lying on the ground with the plate and some rock. (Tr. 2:192-93). The roof bolt on the ground was not the entire roof bolt. (Tr. 2:193). The escapeway area at the time was not part of the two officially designated escapeways out of the working section. (Tr. 2:194). Schiff testified that he could not determine when the condition occurred. (Tr. 2:197). On cross-examination, Schiff stated that heavy machinery had not been in the area for a year or two, but did not think that any equipment sheared the bolt. (Tr. 2:198-99). He thought that the roof bolt might have been damaged during installation. (Tr. 2:200).

Kevin Rice, the mine examiner, testified that he had been an examiner for four to five years. (Tr. 2:206). On February 25 and 26, he was performing the preshift examinations in the

area in question. (Tr. 2:209-10). Rice stated that on February 25, no roof bolt had fallen within the area, and then on the next day two timbers supported the roof and a roof bolt was on the ground. (Tr. 2:210). Rice wrote up a statement for Lee after he found out that an order was issued, because he had not personally spoken with Lee. (Tr. 2:213; Ex. R-10). On cross-examination, Rice testified that he had been driving around fallen rock in the intake because it is customary to leave rock on the ground when scaling down loose rock in between pins. (Tr. 2:215-16).

b. Summary of Parties' Arguments

The Secretary argues that the examiner failed to record the unsupported roof in the north intake and thus violated section 75.360(a)(1). (Sec'y Br. 29). A roof bolt was lying on the ground with rocks around it, and tire tracks where located around and over the debris. This indicates that examiners had traveled through the area and knew about the hazardous condition. The violation was properly designated as S&S and highly likely because the missing roof support exposed miners to falling rocks. The violation was also the result of an unwarrantable failure because the condition was obvious, had existed for more than two examinations, and the operator was on notice for the quality of examinations.

Big Ridge contends that no violation existed because the roof bolt fell between the time Inspector Lee arrived and Rice's prior examination and thus the condition had not been present during Rice's exam. (Big Ridge Br. 29). It argues that the presence of tire tracks does not help establish the violation. Rice credibly testified that some material had previously fallen from the roof between roof bolts so these tracks are unrelated to the alleged violative condition.

c. Discussion and Analysis

There is no dispute that a roof bolt had fallen out at the location cited by Inspector Lee. What is not clear is when the bolt fell and what caused it to fall. The cited area, although required to be examined, was not a travelway or a designated escapeway. Mr. Schiff's testimony that the bolt had not been properly installed is the most logical explanation. Only part of the bolt fell out. Heavy equipment had not been in the area for several years so it had not been recently damaged.

I find that the Secretary did not establish a violation because it is not at all clear when the roof bolt fell. Although Inspector Lee testified that there were tire tracks over fallen rock, Rice credibly testified that loose rock had been scaled down between pins in this area. (Tr. 2:215). Examiners may have driven over or around such loose rock. Rice testified that he only records roof conditions under these circumstances if he finds loose roof bolts, bolts that have fallen, or if so much material has fallen that it creates a hazard. He said that the cited roof bolt had not fallen at the time of his examination on February 25. (Tr. 2:210; Ex. R-10).

The Secretary bears the burden of establishing a violation of her safety standard. In this instance, I find that it is not clear when the roof bolt fell. There is conflicting evidence on this point. Rice was an experienced examiner and his testimony was credible. Given that the roof

had been crumbling in that area, the presence of rock on the floor of the mine with tire tracks over and around the rocks does not establish when the bolt had fallen. The inspector's analysis of the conditions was based almost entirely on his interpretation of the tire tracks. He assumed that the rock had fallen at the same time as the roof bolt. (Tr. 137). Based on the record, I find that his conclusions were speculative. Order No. 6683119 is hereby **VACATED**.

3. Citation No. 6683100

On February 9, 2009, Inspector Lee issued Citation No. 6683100 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 75.1103 as follows:

> When the fire suppression system was tested at the belt drive and take-up area it would not give a warning to the belt monitor located on the surface. This condition was observed on the 4C belt. It was immediately taken out of service.

Ex. GX-26. The inspector determined that an injury was reasonably likely to occur and that the injury would be expected to include lost workdays or restricted duty. He further determined that the violation was S&S, the company's negligence was moderate, and three persons were affected. Section 75.1103, entitled "Automatic fire warning devices" provides that "[d]evices shall be installed on all such belts which will give a warning automatically when a fire occurs on or near such belt." 30 C.F.R. § 75.1103. The Secretary proposes a penalty of $1,795.

a. Background Summary of Testimony

Inspector Lee testified that he issued Citation No. 6683100 on February 9, 2009, at 6:20 p.m. because the fire suppression system did not produce a warning on the surface when tested. (Tr. 2:221-22). The fire suppression system was located on the 4C belt line and the warning indicates that there could be a fire at a specific location. (Tr. 2:222-23). The main purpose of the fire suppression system is to give early warnings to the operator in order to better control fires and reduce injuries. (Tr. 2:223-24). Lee testified that he was with Kanady and Greg Fort during his inspection of the fire suppression system. (Tr. 2:225). To check the fire suppression system, a test valve turns on water simulating what the system would do in the case of an actual fire. (Tr. 2:227, 233). Lee stated that Fort was the one who performed this task. (Tr. 2:233). When the test valve is on, the system will notify the belt monitor, located on the surface, that the belt line fire suppression system is working. (Tr. 2:229). The system has a five-second delay between when the valve is turned on to when the warning is received. (Tr. 2:228). According to Lee, the belt monitor, after noticing the warning, should alert the mine manager of the situation. (Tr. 2:230). Lee checks to see if the belt line stops and also waits for a call on the mine phone for the belt monitor on the surface to inform him of the warning. (Tr. 2:230-31). During the test, the belt line shut down as designed, but Lee never received a call from the monitor about there being a warning relayed above. (Tr. 2:233). Lee had another worker call up to the monitor to ask if a warning had been received on the 4C line, but no warnings had been received. (Tr. 2:235-36). Before Lee issued the violation, he tested the fire suppression system one more time, with the same result. (Tr. 2:237).

Lee further testified that he designated the violation as reasonably likely to result in injury because the warning is a significant part of the fire suppression system. (Tr. 2:239-40). Stopping the belt line and spraying water are not always sufficient to stop a fire within the mine. (Tr. 2:240). When the warning system is not working properly the early detection of a fire is lost, thereby increasing the possibility of injuries. (Tr. 2:241). Lee testified that lost work days or restricted duties could occur because of smoke inhalation from the fire. (Tr. 2:241). The violation was determined to be S&S because the smoke from a fire could cause a serious injury. (Tr. 2:244). The negligence was moderate because the operator might not have known that the system was not functioning properly. (Tr. 2:245). Three days prior, the system check showed that it was working properly. (Tr. 2:245). Lee determined that the additional presence of a CO monitoring system in the area had no effect on the violation because it is not very reliable. (Tr. 2:247). Lee abated the citation three days later when the test of the system showed a warning alarm was being received by the monitor above. (Tr. 2:250).

On cross-examination Lee testified that he did not write down in his notes that he tested the fire suppression system twice on February 9, 2009. (Tr. 2:251-52). Lee agreed that, under section 75.1103(4)(a), the belt must be equipped with automatic fire sensors and warning devices and that, under section 75.1101(10), carbon monoxide monitors or point heat sensors are required. (Tr. 2:256). Lee also stated that he did not have any data showing that CO systems were not reliable. (Tr. 2:259).

Fort, the Union representative, accompanied Inspector Lee during the testing of the 4C belt line fire suppression system. (Tr. 2:261). Fort testified that the system was tested twice and each time the monitor received no warnings. (Tr. 2:262-63). Furthermore, Fort stated that during this time frame at the mine, the CO system was having "a lot of trouble" and had many false readings, but none around the belt drive. (Tr. 2:265-66). On cross-examination, Fort testified that Inspector Lee turned the water valve on to test the fire suppression system. (Tr. 2:268). During the test, the belt shut down and the underground alarms went off. (Tr. 2:269).

Kanady testified that he did not recall testing the fire suppression system more than once or who actually opened the valves for the test. (Tr. 2:270-71). An underground alarm did go off by the belt line, however. (Tr. 2:271).

Butler, the belt foreman, testified that after the citation was issued the fire suppression system was tested again and the entire system worked fine. (Tr. 2:273-74). He opined that Lee did not let the water run long enough for the system to work. (Tr. 2:274). On cross-examination Butler stated that he did not personally re-test the fire suppression system and noted that all the belts in the mine were on the five-second delay. (Tr. 2:277, 279).

Jeff Klope, the electrical foreman, testified that there is a three-second delay in the local system and then a seven-to ten-second further delay on the network to scan the system. (Tr. 2:283). The delay could be up to thirteen seconds, but also could be less. (Tr. 2:284). MSHA requires that CO sensors be calibrated and checked. (Tr. 2:286). In February of 2009, Klope testified that the CO system in the mine was not experiencing any problems. (Tr. 2:287).

b. Summary of Parties' Arguments

The Secretary argues that the operator violated section 75.1103 because the fire suppression system failed to send a warning to the belt monitor on the surface. (Sec'y Br. 32). Lee had tested several belt lines that day, all with the five-second delay, and the 4C line was the only one that did not send a signal to the surface. Lee let the water run for a sufficient time in order to bypass the delay. The violation was properly designated as S&S because the warning alarm failure will reduce the response time in a fire. (Sec'y Br. 33). The Secretary contends that in this instance the S&S designation should be evaluated while assuming the existence of an emergency because warning systems are designed to protect in the case of an emergency.

Big Ridge first argues that no violation existed because the wrong standard was cited and no violation existed. (Big Ridge Br. 30). Section 75.1103 only applies to point heat sensors or CO monitoring devices. Along the belt line, the fire warning device was the CO system. Section 75.1103(10) addresses the fire suppression system and does not require a warning alarm be sent to the surface. Big Ridge contests the performance of the test arguing that Lee or Fort did not let the system run for longer than five seconds. If a violation did exist Big Ridge also contests the designation of S&S. (Big Ridge Br. 33). The CO system on the belt line would produce a warning of a fire, and was functioning at the time of the test. A belt shut down would draw a response because it would halt production inby. Therefore, there would be no delay in response time if a fire had occurred.

c. Discussion and Analysis

The cited safety standard requires that devices be installed at belts that will give a warning automatically when a fire occurs. This section does not require fire suppression systems. As a consequence, whether the water-based fire suppression system was working is not covered by the safety standard. Assuming that the water-based fire suppression system was the only warning device installed at the cited location, it did provide a visual and audible warning when tested by the inspector. More importantly, Big Ridge had installed a CO monitoring system that would give a warning if a fire were detected. Although Fort testified that it would sometimes give false readings, there was no evidence that the CO monitoring system was not functioning properly at the time of the inspection.

Section 75.1103-1 provides that fire sensing systems installed on belt conveyors must "provide both audible and visual signals that permit rapid location of the fire." 30 C.F.R. § 75.1103-1. The system cited in this instance did give audible and visual signals and miners underground would normally be able to determine where the system had been activated. Of course, if a signal had been received by the belt monitor on the surface, the precise location of a potential fire would have been immediately known. Nevertheless, I credit the evidence presented that Big Ridge uses the CO monitoring system as its fire detection system, which also notifies personnel on the surface when a fire has been detected.

Section 75.1101-10 is the safety standard that more closely fits the fire suppression system in use at the Willow Lake Portal. It provides that each water sprinkler system shall be

equipped with a device designed to stop the belt drive in the event of a rise in temperature and requires that "each such warning device shall be capable of giving both an audible and visual warning when a fire occurs." 30 C.F.R. § 75.1101-10. This standard clearly applies to the fire suppression system cited by the inspector and there is no indication that this standard was violated.

I find that a violation of section 75.1103 was not established. Citation No. 6683100 is **VACATED**.

III. SETTLED CITATIONS

The parties presented a settlement offer at the hearing for those citations that were not adjudicated at the hearing. The proposed settlement is as follows:

Citation/Order	Modification to Citation	Proposed Penalty	Amended Penalty
Lake 2009-326			
6679522	Modify to 1 Affected	$9,634	$6,458
6674555	Modify to Non S&S	$1,944	$392
6674640		$1,304	$1,044
6683615	Modify to 3 Affected	$2,473	$807
9942532		$1,944	$1,944
6678792		$1,944	$1,944
6678795		$1,944	$1,944
6678796	Modify to Permanently Disabling; Partial Penalty Reduction	$3,996	$2,400
6679920		$3,405	$3,405
6679921		$1,657	$1,657
9942536	Modify to Moderate Negligence	$8,893	$2,678
LAKE 2009-436			
6683974		$1,026	$923
7572890	Modify to Non S&S	$3,405	$688
6683095	Modify to 8 Affected	$9,634	$6,996
6682840		$12,248	$9,799
6683975		$2,748	$2,102
6683977		$2,473	$2,102
6683979		$2,473	$2,102
6683980		$2,473	$2,102
6683983		$2,678	$2,276
6683985		$2,473	$2,102
6683098	Modify to 3 Affected	$1,111	$363
6683987	Modify to Moderate Negligence	$2,901	$874
6683099	Modify to 3 Affected	$1,304	$426
6683101	Modify to Non S&S	$5,080	$1,026
6683991	Modify to Moderate Negligence	$2,901	$874

6683992	Modify to Reasonably Likely	$12,248	$5,503
6683993		$5,503	$5,503
6683994		$3,689	$3,136
6683104	Modify to Non S&S	$1,530	$309
6683995		$3,143	$2,892
6683105	Modify to Moderate Negligence	$3,143	$947
7572894	Modify to Non S&S	$3,996	$807
6683108		$3,143	$2,892
6683110	Modify to Non S&S	$5,080	$1,026
6683114		$4,689	$3,752
8414006		$3,143	$2,829
6680506		$1,795	$1,795
6683120		$11,306	$10,175
8414008		$3,143	$2,829
8414010		$5,080	$4,064
8414011		$6,458	$5,167
8414012	Modify to Non S&S	$8,893	$1,796
6680675	Modify to Moderate Negligence	$1,530	$461
LAKE 2009-705			
6682989		$17,301	$17,301
8417664		$5,645	$4,516
LAKE 2009-706			
6682990	Modify to 8 Affected	$48,472	$37,416
8417432		$2,901	$2,611
8417434	Modify to Non S&S	$1,657	$335
8417436	Modify to 4 Affected	$27,259	$19,793
8417437	Modify to 4 Affected	$2,473	$1,795
6682993	Modify to Permanently Disabling; Partial Penalty Reduction	$3,996	$2,400
8417438	Modify to Non S&S	$1,657	$335
8417439	Modify to Non S&S	$2,106	$426
8417440	Modify to Moderate Negligence	$14,373	$4,329
6682996	Modify to Permanently Disabling; Partial Penalty Reduction	$3,996	$2,400
8417441	Modify to Non S&S	$2,473	$500
8417442		$5,961	$5,961
8417443	Modify to Non S&S, Moderate Negligence	$6,458	$392
8417444		$2,106	$2,106
8417445		$3,996	$3,597
6682999	Modify to Moderate Negligence	$10,437	$3,144
8417446	Modify to Moderate	$5,080	$1,530

	Negligence		
8417447		$3,405	$3,065
8417451		$1,412	$1,271
8417455		$15,570	$12,456
8417456	Modify to Non S&S, Moderate Negligence	$4,689	$285
8417458	Modify to Non S&S	$1,795	$362
8418003	Modify to Non S&S, Moderate Negligence	$6,458	$392
8418004		$2,282	$2,054
8417680	Modify to Non S&S	$5,503	$1,111
Total Settlement Amount: $247,194			

I have considered the representations and documentation submitted and I conclude that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have reviewed the Assessed Violation History Reports, which are not disputed. (Ex. GX-41). At all pertinent times, Big Ridge, Inc., was a large mine operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Big Ridge's ability to continue in business. The gravity and negligence findings are set forth above.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation/Order No.	30 C.F.R. §	Penalty
LAKE 2009-325		
6675150	75.400	$15,000.00
6675151	75.360(a)(1)	$20,000.00
LAKE 2009-326		
6678829	75.1722(b)	$1,000.00
6678835	75.1722(b)	$4,000.00
LAKE 2009-435		
6683115	75.362(b)	$20,000.00
6683119	75.360(a)(1)	VACATED
LAKE 2009-436		
6683100	75.1103	VACATED
6683116	75.1725(a)	$8,000.00
6683117	75.400	$12,000.00
LAKE 2009-706		
8417452	75.400	$10,000.00
SUBTOTAL		$90,000.00
SETTLED CITATIONS		$247,194.00
TOTAL PENALTY		$337,194.00

For the reasons set forth above, the citations are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above. Big Ridge, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $337,194.00 within 40 days of the date of this decision.[4]

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

Distribution:

Tyler P. McLeod, Esq. and Francesca Cheroutes , Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202-5708 (Certified Mail)

R. Henry Moore, Esq., and Jason Webb, Esq., Jackson Kelly, 3 Gateway Center, Suite 1340, 401 Liberty Ave., Pittsburgh, PA 15222 (Certified Mail)

RWM

[4] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

January 5, 2012

EXCEL MINING, LLC.,	:	CONTEST PROCEEDING
Contestant,	:	
	:	Docket No. KENT 2008-1481-R
v.	:	Order No. 8216265; 7/21/2008
	:	
SECRETARY OF LABOR	:	Mine ID: 15-08079
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine: Mine No. 3
Respondent.	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2009-33
Petitioner,	:	A.C. No. 15-08079-162018-01
	:	
v.	:	
	:	
EXCEL MINING, LLC.,	:	
Respondent.	:	Mine No. 3

DECISION

Appearances: Matt S. Shepherd, Esq., of the Office of the Solicitor, U.S. Department of Labor, Denver, CO, on behalf of the Secretary of Labor;
Noelle Holladay True, Esq., of Rajkovich, Williams, Kilpatrick, Lexington, KY, and Gary D. McCollom, Esq., Corporate Counsel for Excel Mining, LLC, on behalf of Respondent, Excel Mining, LLC.

Before: Judge L. Zane Gill

Procedural History

This case involves a Petition for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). It alleges that Excel Mining, LLC ("Excel") is liable for a single 104(d)(1) violation[1] of the Secretary's Mandatory Safety Standards (30 C.F.R. § 75.220) for Underground Coal

[1] The Secretary's original Petition for Assessment of Civil Penalty charged Excel with 20 violations of the Act and proposed a total penalty of $95,293.00. The parties were able to reach settlement on 19 of those charges. Only citation No. 8216265 remains to be decided here.

Mines, and seeks a total civil penalty of $23,229.00. A hearing was held on April 6, 2011, in Pikeville, KY. The parties filed briefs after receipt of the transcript.

For the reasons set forth below, I find that Excel committed a violation of 30 C.F.R. § 75.220, but I reduce the negligence to "moderate." I conclude that the violation was significant and substantial ("S&S") and constituted an unwarrantable failure to comply with the alleged mandatory standard. Thus, I impose a civil penalty in the amount of $6,997.00.

Stipulations

1. At all times relevant to this proceeding, Excel Mining, LLC was the operator of the No. 3 mine, Mine ID Number 15-08079.

2. The No. 3 mine is a "mine", as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. Sec. 802(h).

3. At all times relevant to this proceeding, products of the No. 3 mine entered commerce or the operations or products thereof affected commerce within the meaning and scope of Sec. 4 of the Mine Act, 30 U.S.C. Sec. 803.

4. Employees at the No. 3 mine produced more than 1.7 million tons of coal in 2008. Excel Mining, LLC is a "large operator."

5. A copy of the citation at issue in this proceeding was served on Excel Mining, LLC by an authorized representative of the Secretary.

6. Excel Mining, LLC timely contested the citation.

7. Excel Mining, LLC is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission, and the presiding Administrative Law Judge has the authority to hear this case and issue a decision regarding this case.

8. The proposed penalties will not affect Excel Mining, LLC's ability to remain in business.

9. On January 25th, 2011, counsel for the Secretary requested that the Respondent produce copies of the pre-shift reports that were completed from July15th, 2008 to July 22nd 2008 for the 004 section. The Respondent has indicated that these reports are no longer available.

Allegations

Citation No. 8216265 (Exhibit G-1) alleges that Excel violated the mandatory standard found at 30 C.F.R. § 75.220, relating to roof control plans ("RCP"). Specifically, it alleges that Excel failed to maintain the minimum pillar block size required by its approved RCP during retreat mining at its Mine No. 3. It alleges that the RCP prohibits cutting outby pillar blocks to less than eight feet along each stump face, and that Excel cut the blocks in entries 4, 5, and 6 in the 004 section of the mine to less than those minimums. In addition, it alleges that Excel had a practice of cutting pillar blocks too small, of which this incident was the latest manifestation, and which persisted despite a previous warning. It also alleges that this practice resulted in hazardous roof loading, evidenced by various signs of excess roof weight, including an unaddressed roof fall at entry 3. The citation alleges "high" negligence and characterizes the gravity as S&S and "highly likely" to result in a fatality for one person.

Fact Summary

MSHA Inspector Silas Adkins ("Inspector Adkins")[2] traveled to Excel Mining's No. 3 mine on July 21, 2008, to continue a quarterly E01 inspection. When he arrived, he reviewed the pre-shift/on-shift examination book (Tr. 31:21-32:16), then began his inspection of Mine No. 3, section 004. Billy Stiltner ("Stiltner"), another MSHA inspector, helped Inspector Adkins conduct the inspection. They split up, each taking half the mine area. (Tr. 189:20-190:6) Brady Fouch ("Fouch")[3], the mine's day shift foreman, accompanied Inspector Adkins to inspect entries 4, 5, 6, 7, and 8 on the right side of the 004 section. (Tr. 34:13-35:14; 40:22-42:9; 151:2-153:25; 185:8-15; 189:1-190:21; 249:9-14) Derick Adkins, section foreman on section 004, went to the other side with Stiltner. (Tr. 190:16-191:4; 247:16-248:1; 249:9-14) At the time, miners were retreat mining[4] in section 004. (Tr. 18:16-19:12) Section 004 comprised eight entries, creating seven coal blocks that were being removed. (Tr. 36:1-19; Exhibit G-2A) The citation at issue in this case alleges RCP violations in four of the eight entries - entries 3, 4, 5, and 6. (Exhibit G-1)

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[2] There are two men with the last name Adkins important to this case - MSHA Inspector Silas Adkins, and Derick Adkins, a section foreman for the Excel mine.

[3] The section foremen reported to Fouch. (Tr. 222:24-224:1) Section foremen and all miners are expected to be familiar with the RCP and know what size stumps to leave in a pillaring section. (Tr. 224:14-25)

[4] Retreat mining involves a process called "pillaring" in which the coal pillars that are left for roof support as mining advances are cut out as the miners and machinery "retreat" back out of the mine. In the process, the roof is allowed - and expected - to fall in as the retreat progresses, to reduce pressure on the roof in areas yet to be pillared. (Tr. 18:25-31:10; 201:25-202:7)

Preparations for retreat mining are made during the advance mining phase in a process called "rooming off." As retreat mining progresses, coal is cut from the pillars[5] created during advance mining according to a very specific sequence and to dimensions set out in the RCP. The RCP also specifies how many and where breaker timbers are to be set after each cut. (Tr. 18:16-23:23)

Coal was being extracted by two continuous miner machines, one on each side of the section. (Tr. 18:25-22:21; Exhibit G-2A) The swath of coal extracted by a continuous mining machine is called a "lift" or "cut." (Tr. 18:25-22:21) According to the RCP, after each lift during retreat mining, miners are required to set eight breaker timbers for roof support at the intersection of the entry and the cross cut.[6] (Tr. 18:25-22:21;165:16-166:9) They are also required to leave blocks at the corners of the pillars, measuring at least eight feet on a side,[7] to provide adequate roof support as retreat mining proceeds. (Tr. 25:1-6) The remaining blocks are the primary means of supporting the roof during pillaring. The breaker timbers provide some additional roof support. (Tr. 202:11-22) Ultimately, it is intended that the roof collapse along a line created by the breaker timbers and the remaining blocks.[8] (Tr. 28:10-29:5)

One of the purposes of Inspector Adkins' inspection was to confirm that breaker timbers had been properly set and to determine whether the required amount of coal had been left in the pillar "stumps" to support the roof as retreat mining continued. (Tr. 42:6-10; 27:6-17)

Entry 4

When Inspector Adkins arrived at entry 4, breaker timbers had been set, preventing him from moving in any closer to inspect the remaining blocks. He checked from a safe distance to see if the required timbers had been set and to check the integrity of the roof in the area where

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[5] The terms "pillar," "pillar block", and "block" are interchangeable. The term "stump" is used sparingly in this decision for the reasons discussed below.

[6] See **Figure 1** below. The eight timbers are shown (partially) at the bottom of the figure as heavy dots, arranged in two rows of four. Timbers are usually made from soft wood which audibly cracks when they take weight, giving a warning - hence the term "breaker" timbers. (Tr.30:18-31:10)

[7] There are times and conditions that call for more than eight foot pillar block dimensions at the mine's discretion. For example, a bad bottom could make it hard to maneuver a continuous mining machine; more coal is left in the blocks and wider guidelines are drawn. (Tr. 203:10-205:17)

[8] Once the coal has been removed, the roof is supposed to fall in. When the roof falls, the timbers are supposed to break. (Tr. 201:7-20; 202:23-203:9; 268:21-269:9) It is better if the roof falls right away; it reduces pressure on the remaining roof. (Tr. 201:25-202:7)

they would be retreating into next. (Tr. 42:22-43:16) From his vantage point, he concluded that the blocks left at entry 4 were less than eight feet on a side. (Tr. 43:25-44:16)

The RCP (Exhibit G-5, page 39) required that all blocks measure at least eight feet along each side. (Tr. 23:6-24:18; 225:6-22) The outby block corners appeared to Inspector Adkins to be significantly less that eight feet on a side. He could not confirm this to any greater degree of accuracy because he could not go inby the breaker line for safety reasons. (Tr. 42:13-14; 43:25-44:16)[9] Stiltner made notes about what he observed at entry 4. (Exhibit G-7) They confirm that the block corners at entry 4 were less than eight feet. They also note that he could not see the outby corners of the pillars, and that the last timber was broken in the breaker row. Stiltner noted this because he considered it a serious situation, and he wanted to document that he was in personal danger as he inspected because of this situation. (Tr. 157:8 -158:6)

Excel argued[10] that there had been a roof fall at entries 4 and 5, and that it had destroyed the outby blocks at entries 4 and 5. Inspector Adkins did not recall with certainty if there was any evidence of such a roof fall, however even if there had been, the outby block corners were still sufficiently visible to assess their size and integrity. (Tr. 94:10-95:15) Inspector Adkins testified that he saw no evidence of sloughage on the blocks, as claimed by Excel's witnesses. He observed clean cuts. (Tr. 62:25-64:15) In describing Exhibit G-2A, Inspector Adkins testified that the outby blocks on both sides of entry 4 were too small. He estimated that they were between one and four feet. (Tr. 43:23-44:16)

Entry 5

Inspector Adkins concluded that the outby blocks in entry 5 were undersized as well. (Tr. 44:20-25) He was approximately 25 feet away from the corner blocks in entry 5 when he observed them with the light from his cap lamp. (Tr. 44:20-45:19; 92:16-94:9; 274:14-18) It was obvious to him, even with these limitations, that they were less than eight feet on a side. (Tr. 53:10-54:1; 91:19-92:11) Inspector Adkins wrote the citation because he concluded that there was less than eight feet of supporting wall left on at least one side of the blocks in entries 4, 5, and, 6. It did not matter to him whether it was one foot or four feet or more as long as it was less than the minimum of eight feet. (Tr. 107:20-109:2)

As discussed below in greater detail, Excel argued, and its witnesses testified, that if a coal block is not cut on all four sides, it should not be considered a stump. (Tr. 234:15-237:15)

In contrast, Fouch testified that there was also roof fall material in entry 5. From a distance of 20 - 30 feet (Tr. 219:11-14), he could see the side of the blocks closest to him, but the rest was obliterated. (Tr. 209:23-211:6) He recalled that the remaining blocks appeared to be at

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[9] No one is allowed to be inby the breaker line (Tr. 42:13-14).

[10] Respondent's Post-Hearing Brief, page 4.

least eight feet on a side. (Tr. 211:11-23) He disagreed that the stumps in entries 4 and 5 were between one foot and four feet. (Tr. 220:4-16) Fouch testified that he had no way to even know about the over cutting in entries 4 and 5, since they had been cut the night before and the area had since fallen in. (Tr. 220:25-221:6; 255:7-18) He denied seeing any stress fractures, nor did he remember Inspector Adkins pointing them out. (Tr. 218:6-13)

Fouch denied admitting to Inspector Adkins that he knew that the blocks in entries 4 and 5 were being cut to less than eight feet. (Tr. 220:17-24) He denied that he apologized for the blocks being over cut. He did not believe that the blocks had been over cut, except for entry No. 6. (Tr. 222:1-15) He did not recall another citation for undersized blocks issued in July 2008. (Tr. 222:16-20)

Fouch agreed hypothetically that if the blocks at entries 4 and 5 were cut to less than 8 feet, Derick Adkins, the section foreman, should have noted the fact on his imminent danger run and "dangered off" the section and moved away from the area. However, he disagreed with the assumptions underlying the hypothetical. (Tr. 238:8-241:14) Derick Adkins admitted that he might have told Silas Adkins that too much had been cut out, but he claimed that it was in reference to the entry with the bad bottom. (Tr. 283:5-13)

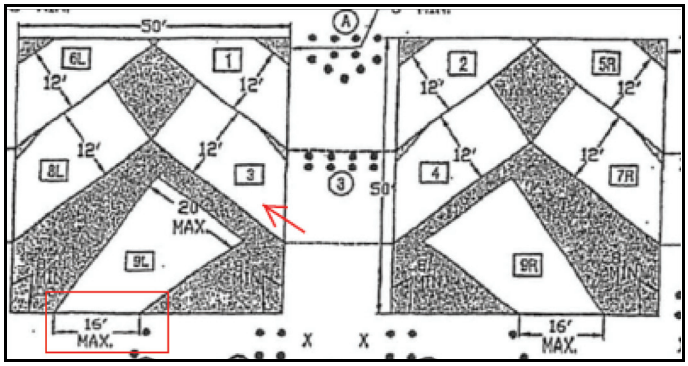

Figure 1

Entry 6

Inspector Adkins also found the stumps in the entry 6 inadequate. However, the "push out" cut had not yet been taken from the front face flanking the number 6 entry when he made his

observation and wrote the citation.[11] The third cut in the number 6 entry[12] could not leave the eight by eight foot stump required by the RCP. Inspector Adkins concluded that the third cut left only one foot along left side[13] of the block from which the push out cut would have been taken. This would have left one side of the block, if it had been finished by taking the push out, measuring significantly less than eight feet. (Tr. 47:8-48:13; 87:11-16).[14]

Stiltner also observed the conditions at entry 6. His notes confirm that the stumps in entry 6 were less than eight feet. (Tr. 158:7-14; 161:2-14; 182:1-20) Stiltner chose not to put himself in jeopardy just so he could be more precise in his estimates. If a pillar looked less than eight feet from where he was, he did not go into danger to confirm it. He made his estimate based on the known spacing of roof bolts. (Tr. 160:1-161:2; 175:12-177:18)

Fouch did not believe that Inspector Adkins could see any of the stump at entry 4, and only part of the stump at entry 5. The stump at entry 6 was the only one he could see. (Tr. 231:2-10) After being shown his own notes however, Fouch conceded that some of the stump at entry 5 was visible. (Tr. 231:11-21)

According to Fouch, the bottom (floor) was bad at entry 6. No push out cut had been taken from entry 5 (Tr. 213:2-4), and the miner operator had already moved the continuous miner to entry No. 7. (Tr. 213:5-6) Inspector Adkins wanted to talk to miner operator, Mike Estep, ("Estep") about what happened. Estep explained that he had not taken the last cut, and had moved the miner out of entry 6. The entry 6 area was breakered off and the miner moved to entry 7. Once this was done, there was no way to come back in for the final cut. (Tr. 213:7-214:16)

The continuous miner tore up the bottom at entry 6, which affected its ability to maneuver. Estep told Derick Adkins that he did not think he was going to be able to leave eight feet in the stump, so Derick Adkins told him to skip the push out cut to the left of entry 6. Estep backed the miner out, timbers were set, and the continuous miner was moved to entry 7. (Tr. 264:15-266:20) Derick Adkins testified that he did not feel any pressure about having to sacrifice coal production. (Tr. 263:7-20); 266:21-267:5)

From what Fouch saw, it was clear that the miner operator had finished with entry 5 and

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[11] The "push out" cut is the final cut made in the outby surface of a coal pillar before setting the breaker timbers for that entry and moving the mining machine to the next pillaring area. (Tr. 45:23-46:18)

[12] The sequence of cuts during the pillaring process is set out in the RCP in Exhibit G-5, page 39 (Tr. 23:6-24:18), (**Figure 1**). The third cut is shown with an arrow; the "push out" that was not taken is shown by a rectangle.

[13] When the terms "left" or "right" are used, it is assumed that the observer is facing inby.

[14] This would, of course, also be at least a technical violation of the relevant standard.

had moved to entry 7. There was no intent to take any more cuts out of this area because it had been breakered off, and the miner had already started cutting coal in entry 7. (Tr. 214:15-24) This is consistent with Fouch's opinion that if a miner takes too much off a stump, the foreman should make the decision to back out and move to the next block, abandoning the last cuts. To do otherwise would not be safe. (Tr. 206:14-207:7) It that case, where a cut was abandoned, there could still be a sizeable block of coal - not just a pillar - left to support the roof. (Tr. 207:8-18)

Nonetheless, Fouch conceded that the miner operator had cut outside the paint lines at entry 6[15] (Tr. 232:17-233:6) and that there was only one foot of the block wall left on the outby left corner. (Tr. 233:7-234:1) He contended that because they did not take the last cut at entry 6, there was, in reality, no stump at all. What resulted, in his view, was an unmined pillar wall with one side only one foot wide. (Tr. 233:21-234:7) This is consistent with Fouch's view that a stump is an area where there cuts have been taken on all four sides. If that is the case, he agreed that each side must be eight feet or more. If that is not the case, what remains is a block of coal that has not been completely cut - not a stump. Therefore, the eight foot requirement does not apply.

Fouch finally agreed that there was at least a technical violation of the RCP because of the one foot section of the wall or stump, regardless of what it is called. (Tr. 234:15-237:15) He also agreed that if the miners were intentionally cutting the stumps to less than eight feet, it would be a serious violation of the RCP. (Tr. 237:16-238:7)

Entry 3

When Stiltner returned from inspecting his portion of section 004, he conferred with Inspector Adkins and told him that the blocks in entry 3 had been over cut just like those in entries 4, 5, and 6. However, in entry 3, the roof had fallen in, knocked down the breaker timbers (Tr. 50:6-11;170:9-172:24), and pushed material past the breaker line out to where men were hauling coal. (Tr. 48:20-49:17; 51:11-25; 154:20-156:4;163:8-164:11)[16]

Inspector Adkins went to entry 3 to confirm what Stiltner had told him. He found that there had been a roof fall and that no timbers had been set after the fall. According to the RCP, the mine was required to set timbers in such a situation to protect the miners from a bad roof. (Tr. 50:19-51:8) Inspector Adkins considered the roof collapse at entry 3 to be a separate violation of mandatory standard 30 CFR §75.220 (Tr. 119:6-10), and incorporated it into Citation No. 8216265. (Tr. 66:2-67:10) He also testified that, in his mind, there was a connection between the over cutting of the blocks he observed during this inspection (and on a previous occasion) and a roof fall such as that in entry 3. He testified that when a mine removes more coal than allowed in

[15] Paint marks were not required by the RCP at that time. Company policy required them, however. (Tr. 260:19-261:8)

[16] Fouch testified that it was entry 4 that had fallen in and not entry 3. Entry 3 was the travel way. (Tr. 208:10-209:21)

the approved RCP, roof falls - although anticipated and necessary during retreat mining - will involve more material than planned for and will ride out farther than anticipated. (Tr. 51:13-52:23)[17]

Inspector Adkins, Fouch, Stiltner, and Derick Adkins met back up at entry 3. Inspector Adkins asked Derick Adkins how entry 3 looked. He mentioned only that they had some "top" in entry 3.

According to Fouch, the roof had fallen in at entry 3 and "rode out" some breaker timbers, making it impossible to go back in the area to remove any more pillars. (Tr. 216:9-21; 228:25-230:7) Because of the roof fall at entry 3, Derick Adkins decided to set up timbers to "breaker" it off. They gave up the remaining cuts and moved the continuous mining machine on to entry 2. (Tr. 215:11-217:4; 249:19-250:4; 254:2-22)

Derick Adkins contradicted the MSHA inspectors' version of how bad the roof fall was at entry 3. According to his version, the breaker timbers were rode out but not to the extent recalled by Inspectors Adkins and Stiltner. His recollection was that the breaker timbers had been set flush with the block corners by the third shift the day before, and the corners were still intact. (Tr. 269:15-270:17) However, Derick Adkins also testified that the roof fall at entry 3 had obliterated the timbers so that hardly any of them could be seen. (Tr. 250:13-251:5) He recalled that the breaker timbers inby the breaker line at entry 3 were rode out, and that the roof had shifted. (Tr. 278:8-19) He was also "pretty sure" the breaker timbers in the other line (outby) at entry 3 had not been rode out. (Tr. 278:20-279:2) Finally, Derick Adkins denied that the roof fall at entry 3 was as extensive as reported by Inspector Adkins because he would have heard about it and did not. (Tr. 257:15-258:2) He testified that he would have remembered seeing the roof fall at entry 3 if it had pushed out the timbers to the extent testified to by Inspector Adkins because his crew had just set them that morning. (Tr. 270:18-25)

Fouch also challenged Inspectors Adkins' recollection of the extent of the roof fall at entry 3. He did not accept that the roof fall at entry 3 could have taken out a second line of breaker timbers, as claimed by Inspector Adkins. (Figure 2) If it had, it would have been "pretty significant," and he would have a clearer recollection of it. (Tr. 217:10-25) Fouch made notes about the inspection and his recollection of what he saw. (Exhibit G-6) Curiously, the notes document a roof fall at entry 3 and 5, but not at entry 4. (Tr. 231:22-232:5)

Fouch and Derick Adkins testified that the roof fall at entry 3 had only gone to the line represented by the cross cut shown near the center of Figure 2, but according to Inspector Adkins, they were off by a line of timbers. Inspector Adkins testified that the roof fall material at entry 3 had come out to the "X" on Figure 2. (Tr. 292:12-293:6 and Exhibit R-1) He recalled that the roof falls at entry 4 and 5 did not come out as far as the one at entry 3. The blocks in that area

[17] Information about what Inspector Adkins was thinking during his inspection is not included as a finding of fact, but merely to illustrate his thought process and to inform the assessment of his overall credibility as a witness.

were also very visible to Inspector Adkins (Tr. 293:7-20), leaving no doubt about the size of the blocks he observed. (Tr. 293:21-24)

Roof Weight

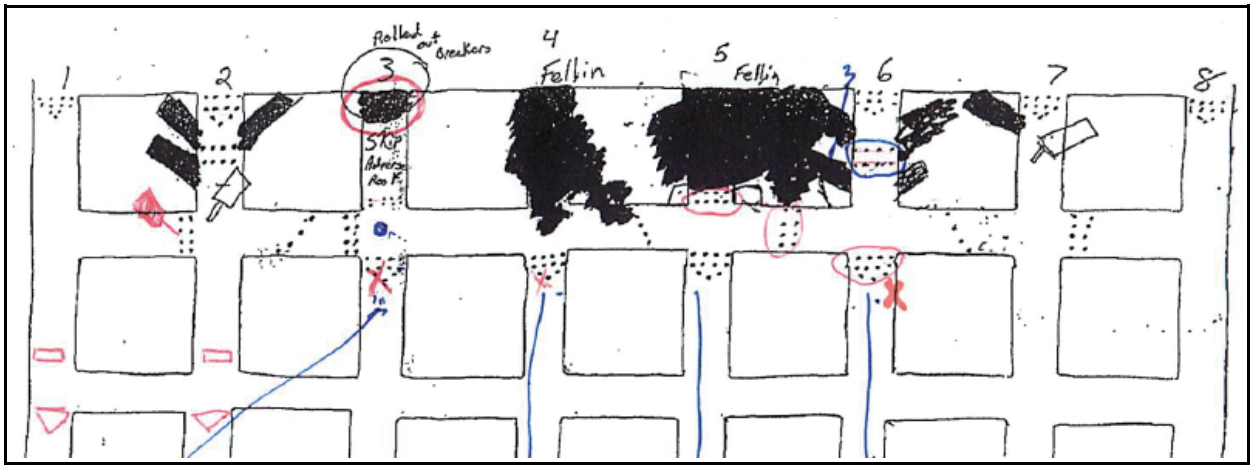

Figure 2

Inspector Adkins observed evidence that indicated to him that the roof was "taking weight." Wooden cap wedges used to secure and drive timbers into place were crushed, and the timbers themselves were pushed into the floor. Some timbers were split from the roof load. He also noted stress fractures in the rock ribs and ceiling running perpendicular to the breaker timbers in entries 4, 5, and 6. (Tr. 56:7-57:18) Inspector Adkins testified that these are indications of extreme weight loads. (Tr. 54:3-24; 56:13-25)[18] Derick Adkins agreed that these weight indicators were present. (Tr. 278:18-288:1) He also testified that his men had detected a crack in a test hole in the ceiling at entry 3 when they ran their test tape up in it. To him, this is an indication that the roof had shifted and was potentially unsafe. (Tr. 250:25-253:24)

Mining Machine Was Too Big

Inspector Adkins testified (and his inspection notes confirm) that Fouch told him that he expected the citation because he saw that the blocks did not meet the eight foot minimums. (Tr. 58:16-59:3 and Exhibit G-2, pages 4 and 5) Fouch denied that he told Inspector Adkins that he knew that the blocks in entries No. 4 and 5 were being cut to less than 8 feet. (Tr. 220:17-24)

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[18] It is significant that some of the timbers were broken because it is an indication of extreme weight. Timbers not only support the roof, but they also serve as a warning indicator. The sound of "breaker" timbers cracking is an audible warning signal and seeing the cracks is a visual warning to miners that the roof is taking too much weight. (Tr. 55:18-56:3: 129:13-130:4; 200:18-201:6).

According to Inspector Adkins' inspection notes and his testimony, Fouch talked with the right side continuous miner operator, Mike Estep, about the over cut blocks. (Tr. 213:7-214:16) Estep admitted that the blocks were not the right size and justified the over cutting because the continuous miner was too big to make a sharp enough turn to leave the eight foot minimums and still swing in to make cuts. (Tr. 59:5-60:19)

According to Inspector Adkins, Derick Adkins also admitted that the blocks had been cut to less than the minimums because the continuous miner was too big. Derick Adkins' statements are documented in the inspector's notes. (Tr. 60:23-61:16 and Exhibit G-2, page 5) However, in his testimony, Derick Adkins denied telling Inspector Adkins that he knew the blocks had been cut too small. He allowed that if he did, he was probably referring to entry 6 where the bottom was broken up, and the miner operator admitted making a mistake. (Tr. 273:3-11) Derick Adkins also denied - albeit not categorically - that he ever told Inspector Adkins that the blocks had been cut too small in entries 4 and 5. (Tr. 273:15-20)

Excel painted guide marks on the ribs and roof to give the men a reference for the eight foot block requirement. (Tr. 63:6-22; 64:23-65:13; 203:10-25) Inspector Adkins noted that the cut marks made by the continuous miner's carbide bits were "significant[ly]" outby the paint marks remaining on the roof . In addition, the four-by-four foot roof bolt pattern gave him an indication of where the continuous miner started cutting the stumps. (Tr. 63:23-64:21; 87:2-10)

S & S and Unwarrantable Failure

Inspector Adkins considered Citation No. 8216265 to be S&S and an unwarrantable failure because, if a proper pre-shift or on-shift examination had been conducted, the violations would have been spotted and abated. (Tr. 96:24-98:19) In addition, Inspector Adkins had issued a citation for the same sort of violation just 11 days earlier. (Tr. 131:2-132:6 and Exhibit G-3)[19] After he issued the earlier citation, he conducted a safety meeting with mine personnel and put them on notice that he would take enhanced enforcement action if he found similar conditions in the future. (Tr. 67:15-69:12; 117:24-118:18; 119:14-120:2)[20]

Inspector Adkins considers over cutting blocks a very serious hazard. (Tr. 84:19-85:4) Over cutting can expose miners to roof falls because it can shift roof weight onto the section where the miners are working. (Tr. 72:14-24; 121:18-122:6) Inspector Adkins testified that the over cutting (and any steps the operator took to remedy the situation) should have been recorded

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[19] Citation No. 6658217 was issued on July 10, 2008. It alleges that the operator was removing too much coal by leaving less than eight foot minimums in four entries at section 001. The operator was allegedly cutting the blocks down to four to five feet. (Tr. 68:12-70:7)

[20] Exhibit G-4 contains field notes relating to Citation No. 6658217, issued on July 10, 2008. There is a notation that documents that Inspector Adkins put mine officials on notice that another incident of cutting the blocks to less than eight feet would result in enhanced enforcement action. (Tr. 70:21-71:18)

in the examination book. (Tr. 76:16-17; 128:5-22) Details of the roof fall in entry 3 should have been recorded in the examination book as well. (Tr. 76:20-24) [21] Lastly, the conditions were "very" obvious in Inspector Adkins' opinion. (Tr. 73:1-17)

With so many blocks being cut beyond the minimums, with the stress fractures, the broken timbers, and the roof fall in entry number 3, it seemed to Inspector Adkins that a fall was a certainty - it was just a matter of time. The miners whose job it was to place timbers after the continuous miner pulled out were being exposed to unnecessary danger because of the over cutting and the resulting hazards. Shuttle car operators were also exposed to unnecessary danger because they traveled by these entries while hauling coal. For these reasons, Inspector Adkins characterized the violation as "highly likely" that an accident would occur. (Tr. 78:1-79:17; 99:13-101:4; 122:7-123:5) However, he did not deem this to constitute an imminent danger. (Tr. 102:13-15)

Mitigating and Aggravating Circumstances

Inspector Adkins considered the possibility that moving the continuous miner back a row could be considered a mitigating circumstance, despite the fact that the continuous miner operator (Estep) said nothing about moving the miner because of over cutting. The discussion dealt only with the condition of the bottom and the fact that he could not maneuver the miner. (Tr. 110:25-111:13) Nonetheless, even though the continuous miner was moved because the bottom was bad and not because of compromised roof support, Inspector Adkins treated it as a mitigating circumstance (Tr. 109:19-110:14; 145:6-23)

Inspector Adkins considered the following to be aggravating circumstances (Tr. 134:13-135:9): He conducted a safety meeting with mine management both after the earlier citation and after this one. This was the second such meeting for the same type violation in 11 days. In the more recent meeting, he covered the same topics as before and reminded mine personnel that this was a repeat violation. He also talked to Derick Adkins and Fouch to confirm that they had conducted safety meetings in the interim. Not only had there been a repeat violation in 11 days, it happened despite similar safety issues being discussed in mine safety meetings. Inspector Adkins testified that despite considering this an aggravating circumstance, he nonetheless considered the interim safety meetings a mitigating factor. (Tr. 131:2-132:6)

Inspector Adkins was convinced that mine management was aware that blocks were being over cut. The fact that Derick Adkins told the miners to move from entry 6 to entry 7 indicated to Inspector Adkins that Derick Adkins was on site and should have witnessed the violation. Derek

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[21] Inspector Adkins reviewed the examination books on the day of the citation. He reviewed the books before he went into the mine. He chose not to cite the Respondent for inadequate examination. He testified that it was an error not to cite the Respondent for inadequate examination. (Tr. 130:12-131:1; 140:10-17)

Adkins' shift started in entry 6, but entries 4 and 5 were cut prior to his shift. To Inspector Adkins, this means the cited conditions in entries 4 and 5 were present when Derick Adkins conducted his on-shift examination. (Tr. 74:20-75:4; 138:15-139:6)

Analysis

There is no dispute that the approved RCP requires eight feet of unmined coal on "the outby and inby corners" of each block. (Exhibit G-5, page 39, Note 12.) What is disputed is: whether Inspector Adkins' assessment of the size of the stumps at entries 4, 5, and 6 was accurate; whether the roof fall at entry 3 was properly pled and extensive enough to be a distinct violation of the standard; whether the alleged violations involve "high" negligence; whether the inspector's assessment of gravity is justified; whether there was an unwarrantable failure to comply with 30 C.F.R. § 75.220; and what penalty, if any, is appropriate.

Assessment of Block Size

Entry 6

Terminology is very important to the resolution of this dispute. Throughout the testimony, the parties used the vernacular term "stump," a term which is not defined, nor to the Court's knowledge, even used in the RCP. The plan uses the word "block" instead. This is particularly significant with respect to the allegations regarding entry 6.

Use of the term "stump" conjures an image of a free-standing, rectangular column of coal. The RCP wisely uses the term "block" instead to describe the unmined coal left for roof support, regardless of its shape or size, and regardless of what stage of the process it pertains to. Otherwise, as is apparent in this case, the result can be unnecessary confusion and possible danger to miners resulting from disputes over terminology.

Excel argues that it did not violate 30 C.F.R. § 75.220 at entry 6 because it did not take the push out cut, and as a result, no stump was created. (See **Figure 2**, supra.) Therefore, it argues, the dimensions of the corner surfaces is irrelevant. This argument fails when assessed in light of the actual wording of the RCP. During the advance mining phase, headings and crosscuts created the blocks that this citation relates to. When Excel attempted to retreat mine the block at entry 6, it reduced its size to the point where one of the surfaces at the outby corner of entry 6 was less than eight feet. The RCP requires that any block of coal left during the mining process measure at least eight feet on a side, regardless of whether it is during advance or retreat mining, and regardless of whether all four sides of the block are reduced during retreat mining.

In this instance, there is convincing evidence that the inby block surface on the left side at entry 6 was less than eight feet. The evidence also makes it clear that the violation occurred when Excel's miners attempted to take the third lift in entry 6. In an apparent attempt to mitigate the situation, Excel did not take the push out cut, they set breaker timbers to barricade off entry 6, and they moved the miner to entry 7. As a result, the RCP was violated despite the fact that no

"stump" was created in the process. It avails nothing that, due to the fact that the push out cut was not taken, the other block surface was considerably more than eight feet. The standard does not allow for the excess size of one block wall to somehow compensate for the deficiency of another block wall. I find that the block wall forming the inby surface of the corner at entry 6 was less than eight feet, and I conclude that this violates the RCP and 30 C.F.R. § 75.220.

Entry 4 and 5

Although Excel's witnesses denied that they made any admission to Inspector Adkins that the pillar blocks in entries 4 and 5 had been over cut, the weight of evidence supports a finding that the blocks in those entries had been cut to less than the required minimums. Inspector Adkins documented in his inspection notes (Exhibit G-2, page 4) that Fouch had admitted that the pillar blocks at entries 4, 5, and 6 had been over cut. Fouch denied making such an admission. However, both MSHA inspectors documented the existence of over cut blocks at entries 4, 5, and 6 in their inspection notes, Exhibits G-2 and G-7, respectively. Their written records are very similar and tend to undercut the less-than-consistent testimony of Excel's witnesses. Excel's witnesses offered differing and less convincing explanations, e.g., sloughage due to the roof fall in entries 4 and 5; inevitable over cutting due to bad bottom conditions; and unavoidable over cutting due to the size of the continuous miner.

I find that the pillar blocks in entries 4 and 5 were cut to less than eight feet on a side and conclude that this makes out an independent violation of 30 C.F.R. § 75.220.

Roof Fall at Entry 3

There is conflicting evidence in the record whether there was a significant roof fall in entry 3 that forced material through the array of breaker timbers that had been set on the outby side of the intersection of entry 3 with the crosscut creating all the entries relevant to this case.[22] Excel's witnesses questioned whether a roof fall had occurred at entry 3 at all, suggesting instead that Inspector Adkins had conflated it with the admitted roof falls in entries 4 and 5. The evidence from inspectors Adkins and Stiltner is more convincing, however. (Tr. 49:10-50:8; 66:19-24; and Exhibits G-1 and G-2) Inspector Adkins noted, and I find, that the roof fall in entry 3 pushed over the timbers that had been placed in entry 3 before the fall, and that after the fall, no replacement timbers had been placed to reestablish the breaker line.

Inspector Adkins considered this an independent violation of the RCP and 30 C.F.R. § 75.220. (Tr. 50:19-51:8) However, when questioned about which provision in the RCP was violated by this roof fall, he gave no specifics. Further, there is nothing in the Secretary's pleadings to indicate which provision of the RCP was violated by the roof fall in entry 3. The Respondent also failed to challenge the sufficiency of the allegation of a roof fall in entry 3 as a separate violation. As a result, although the Secretary and Respondent treated the alleged roof fall as a distinct violation of the RCP, and although there is convincing evidence that the roof fall

[22] See Exhibit G-2A. Explanatory testimony is found at Tr. 48:14-50:8.

occurred, pushed over a group of breaker timbers, and that no replacement timbers were put in place, I conclude that the entry 3 roof fall is not a distinct violation of the RCP. I decline to infer corrections in the pleadings that could have made it facially clear that MSHA considered the roof fall to be a separate violation of the RCP. I also decline to conclude that by failing to challenge the sufficiency of the Secretary's pleadings, the Respondent waived its right to contest whether the entry 3 roof fall was a violation of the RCP. This has no bearing on the violation arising from over cutting the blocks at the other entries.[23]

I do, however, rely on the evidence of the roof fall in entry 3 in the following assessment of the elements of negligence, gravity, S&S, and unwarrantable failure relating to the violation of the RCP arising from over cutting the blocks at entries 4, 5, and 6.

Negligence

Section 110(i) of the Mine Act requires that in assessing penalties the Commission must consider, among other criteria, "whether the operator was negligent." 30 U.S.C. § 820(I). Each mandatory standard carries with it an accompanying duty of care to avoid violations of the standard. An operator's failure to satisfy the appropriate duty can lead to a finding of negligence, if a violation of a standard occurs. In this type of case, we look to such considerations as the foreseeability of the miner's conduct, the risks involved, and the operator's supervising, training, and disciplining of its employees to prevent violations of the standard in issue. *Southern Ohio Coal Co.*, 4 FMSHRC at 1463-64. See also *Nacco Mining Co.*, 3 FMSHRC at 848, 850-51 (April 1981) (construing the analogous penalty provision in 1969 Coal Act where a foreman committed a violation), *cited in A. H. Smith Stone Company*, 5 FMSHRC 13, (January1983).

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required […] to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* "MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous

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[23] I am aware that, under appropriate circumstances, FRCP 15(b)(2) (by way of 29 C.F.R. § 2700.1) allows amendment of a citation post-hearing to conform to the evidence presented during the hearing. *Cumberland Coal Resources, LP,* 32 FMSHRC 442, 447 (May 2010*)*; *Cyprus Empire Corp*., 12 FMSHRC 911, 916 (May 1990). I am also aware that the judge may do so *sua sponte,* as the interests of justice require. Compare *Consolidation Coal Co.*, 20 FMSHRC 227, 235-37 (Mar. 1998) (the Secretary could not amend a citation post-hearing to state a new theory of violation because it was not clear from the record that the operator understood, or should have understood, that a new theory was being litigated) with *Faith Coal Co.*, 19 FMSHRC 1357, 1362 (Aug. 1997) (a citation could be amended after hearing to correct a numbering error by the Secretary because the operator fully understood the gravamen of the correct standard, knowingly litigated the citation on that basis, and suffered no prejudice). In the absence of a motion by either party, or a compelling, substantive reason to craft an *ex post facto* amendment of the citation in this case, I decline to do so.

conditions or practices." *Id.* Reckless negligence is when "[t]he operator displayed conduct which exhibits the absence of the slightest degree of care." Id. High negligence is when "[t]he operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances." *Id.* Moderate negligence is when "[t]he operator knew of should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* Low negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* No negligence is when "[t]he operator exercised diligence and could not have known of the violative condition or practice." *Id.*

Citation 8216265 (Exhibit G-1) alleges "high" negligence. Table X of 30 C.F.R. §100.3 links an allegation of high negligence with the absence of mitigating circumstances. From the evidence summarized above, I conclude that Excel should have known that the pillar blocks in entries 4, 5, and 6 were cut beyond limits set by the RCP. There is no credible question that the blocks in those entries were less than eight feet on at least one side. Although Excel's witnesses attempted to cast doubt on Inspector Adkins perception and accuracy, I am convinced that he was able to make a reasonably accurate assessment of the block dimensions.

As stated above, Inspector Adkins considered the moving of the continuous miner out of the compromised area and foregoing the remaining lifts a mitigating circumstance. He also testified that he viewed the safety meetings in the interim between the two citations for over cutting pillar blocks as evidence of mitigation as well. I am not bound by his perhaps overly generous view of these factors. Nonetheless, I find and conclude that leaving the affected area and giving up the remaining cuts mitigates the negligence element down from "high" to "moderate," in keeping with the guidance in Table X. I do not consider holding safety meetings in response to the first violation anything more than a minimum response to the violation. The fact that the violative conduct was repeated in less than two weeks time speaks loudly against any consideration of this as an act of mitigation.

Gravity

The gravity penalty criterion under section 110(i) of the Mine Act, 30 U.S.C. § 820(i), is most often viewed in terms of the seriousness of the violation. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987). The seriousness of a violation can be examined by looking at the importance of the standard which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. See *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ). The Commission has recognized that the likelihood of injury is to be made assuming continued normal mining operations without abatement of the violation. *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986).

However, the gravity of a violation and its S&S nature are not the same. The Commission has pointed out that the "focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September

1996). The gravity analysis can include the likelihood of an injury, but should focus more on the potential severity of an injury, and the number of miners potentially injured. The analysis should not equate gravity, which is an element that must be assessed in every citation or order, with "significant and substantial," which is only relevant in the context of enhanced enforcement under Section 104(d). See *Quinland Coals Inc.*, 9 FMSHRC, 1614, 1622, n.1 (September 1987).

Citation 8216265 (Exhibit G-1) alleges a high likelihood of a fatal injury to at least one miner as a result of this violation. I concur. Over cutting the pillar blocks was not an isolated, one-off incident. Excel was cited twice for the same violation in less than two weeks. Multiple entries were compromised. Although there is evidence that the condition of the bottom might have played a role in at least one of the entries, the evidence of widespread and repeated over cutting is much more compelling. For these reasons, I conclude that there was a reasonable likelihood of a fatal injury to at least one miner, as alleged.

Significant and Substantial and Unwarrantable Failure

It is clear in the Mine Act that since negligence and gravity, which are clearly delineated in 30 C.F.R. § 100.3 and related tables, apply to all citations and orders, the enhanced enforcement provisions set out in Section 104(d) contemplate something distinct and "more," when talking about significant and substantial and unwarrantable failure. The Secretary must prove negligence and gravity for all citations and orders and, in order to invoke the enhanced enforcement plan in Section 104(d), must also prove that the circumstances of the violation satisfy both the S&S and unwarrantable failure standards**.** If the Secretary fails to prove both, there can be no enhanced enforcement. Thus, the Secretary has to prove four distinct elements[24] when the enhancement scheme in Section 104(d) is alleged: (1) negligence; (2) gravity; (3) "significant and substantial;" and (4) "unwarrantable failure."

Significant and Substantial

In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Federal Mine Safety and Health Review Commission ("Commission") explained that:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. at 3-4.

[24] The Secretary must also prove the existence of the underlying strict liability violation of a health or safety standard.

In *U.S. Steel Mining Co.*, Inc., 7 FMSHRC 1125 (Aug. 1985), the Commission held:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." [. . .] We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial."

Id. at 1129 (internal citations omitted) (emphasis in original).

The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. See *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987). S&S enhanced enforcement is applicable only to violations of mandatory standards. *Cyprus Emerald Res. Corp. v. FMSHRC.* 195F.3d42 (D.C. Cir. 1999)

The evidence of potentially catastrophic roof loading and multiple roof falls beyond the limits set by the breaker lines is important here. It has convincing weight on the issue of potential severity of an injury and supports a finding that a serious injury is at least a reasonable likelihood. In this case there is evidence to support a finding of more than a reasonable likelihood of a significant injury.

I cannot conclude that Excel's practice of over cutting pillar blocks caused the signs of increased roof loading summarized above, however I am convinced that, as a minimum, Excel over cut the blocks in an environment of heightened hazard evidenced by stress fractures, crushed top wedges, and visibly cracked breaker timbers. This is evidence of increased likelihood of injury, which is consistent with the authority cited above. I also conclude that practices that compromise the integrity of the mine roof or are permitted to exist in an area of compromised roof integrity are *per se* of a "reasonably serious nature." The Secretary has proved the S&S nature of this violation.

Unwarrantable Failure

The term "unwarrantable failure" comes from section 104(d) of the Act and, taken together with "significant and substantial," creates a standard for enhanced enforcement procedures, including withdrawal orders and potential enhanced liability, if a pattern of violations is eventually proved.

In *Emery Mining Corp*., 8 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal Inc.* v. FMSHRC, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has examined various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc*., 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. e.g., *Cyprus Plateau Mining Corp*., 16 FMSHRC 1604, 1608 (Aug.1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

One factor not addressed by the authority cited above is how easy it would be for an operator to avoid the violating practice. There is evidence that the continuous miner used in this situation was too big for the conditions or perhaps not operated with the requisite skill level to avoid over cutting the pillar blocks. Either possibility is fully within the knowledge and control of the operator and is of little value as evidence of mitigation, as suggested by Excel. The fact that the final lifts were not taken and the equipment was moved to the next mining area does tend to weigh against a finding of unwarrantable failure. However, the evidence of aggravating circumstances preponderates.

Pillar blocks were over cut in three entries; the practice was extensive. The over cutting occurred twice in a short time period, resulting in two citations for the same violation. Inspector Adkins conducted a safety meeting with miners after the first violation to point out the importance of complying with the RCP and to put mine management on notice that further such violations would lead to enhanced enforcement. In addition, mine management conducted additional safety meetings in the interim between the violations during which it is presumed that some emphasis was put on the importance of complying with the RCP and the dangers of over cutting. Despite this, the second violation happened. The violation was obvious enough for anyone within 30 feet to see with a cap lamp. The violation was significant enough to be specifically included in the RCP. I conclude that Excel's actions constitute a serious lack of reasonable care and were properly characterized as an unwarrantable failure to comply with a mandatory safety regulation.

Penalty

Applying the penalty regulations found at 30 C.F.R. § 100.3 and related tables, I conclude that an appropriate penalty for this violation is $6,997.00.

ORDER

It is ORDERED that Citation No. No. 8216265 be MODIFIED to reduce the negligence assessment from "high" to "moderate."

It is further **ORDERED** that Excel pay a penalty of **$6,997.00** within 30 days of this order. Upon receipt of payment, this case will be DISMISSED.

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

Distribution: (CERTIFIED)

Noelle Holladay True, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, 3151 Beaumont Centre Circle, Suite 375, Lexington, KY 40513

Matt Shepherd, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001
202-434-9981/tele 202-434-9949/fax

January 5, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2010-160
Petitioner	:	A.C. No. 11-03054-201612-1
	:	
v.	:	
	:	
BIG RIDGE, INC.,	:	Mine Name: Willow Lake Portal
Respondent	:	

DECISION

Appearances: Tyler McLeod, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, on behalf of the Secretary of Labor;
Arthur Wolfson, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Big Ridge Incorporated.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The petition alleges that Big Ridge Incorporated is liable for five violations of the Secretary's Mandatory Safety Standards for Underground Coal Mines,[1] and proposes the imposition of civil penalties in the total amount of $28,506.00. A hearing was held in Evansville, Indiana, and the parties filed briefs after receipt of the transcript. The parties settled one of the violations prior to the hearing. Remaining at issue are four violations for which the Secretary has proposed penalties in the amount of $24,506.00. For the reasons that follow, I find that Big Ridge committed the violations and impose civil penalties in the total amount of $14,000.00, for the contested violations.

Findings of Fact - Conclusions of Law

At all times relevant to these proceedings, Big Ridge operated the Willow Lake Portal Mine ("WLPM"), a large underground coal mine located in Saline County, Illinois. The mine operated five super units using the room and pillar mining process. It had miles of belts, and travel to the furthest units could take 45 to 60 minutes. WLPM was a "gassy" mine, liberating over one million cubic feet of methane in a 24-hour period, and was subject to five-day spot inspections under the Act. WLPM operated three shifts, a day shift starting around 6:30 a.m., an

[1] 30 C.F.R. Part 75.

afternoon shift starting at approximately 3:30 p.m., and a midnight, maintenance, shift starting at approximately 11:00 p.m.

In September 2009, Daniel Ramsey, an MSHA ventilation specialist at the time, conducted a six-month review of WLPM's ventilation plan. The review entailed inspecting the mine, checking air readings, determining whether the approved ventilation plan was appropriate for the mining conditions, and ensuring that it was being complied with. Ramsey had over 30 years of mining experience before joining MSHA in 2003, and had inspected the WLPM numerous times. Ramsey found that Big Ridge was not complying with its approved ventilation plan and issued one of the orders at issue in this case.

Another MSHA inspector, Larry Morris, was involved in completing a regular quarterly inspection of the mine, and issued the three remaining violations. Morris is also a highly experienced inspector, having worked in the coal industry for some 30 years, before joining MSHA in 2006. He also had inspected the WLPM numerous times.

The respective violations are discussed below.

Order No. 8418235

Order No. 8418235 was issued by Ramsey at 9:00 a.m., on September 11, 2009, pursuant to section 104(d)(2) of the Act.[2] It alleges a violation of 30 C.F.R. § 75.370(a)(1), which requires that mine operators develop and follow a ventilation plan approved by the MSHA District Manager. The violation was described in the "Condition and Practice" section of the Order as follows:

> The approved ventilation plan was not being followed on Unit-3, MMU 013. A check curtain has been installed in the last open crosscut between #7 and #8 entries at the 106+98 footage mark, short-circuiting the ventilation through the first crosscut outby at the 106+20 footage mark between #7 and #8 entries. Only 7,371 cfm could be measured in the last open crosscut. The curtain was intentionally installed in this location and the section foremen were measuring the return air in the outby crosscut, 106+20.
> A check curtain installed in the last open crosscut is not in the approved ventilation plan, also the approved ventilation plan

[2] The parties stipulated that the underlying section 104(d)(1) order was issued on November 29, 2007, is still in contest, and that, between November 29, 2007 and September 17, 2009, an additional 34 orders were issued pursuant to section 104(d) of the Act, 24 of which remain in contest. Jt. Ex. 1, para. 12.

> requires the return air reading to be measured in the last open crosscut in line with the stopping line.

Ex. G-1.

Ramsey determined that it was unlikely that the violation would result in an injury, that any injury would result in lost work days or restricted duty, that the violation was not significant and substantial ("S&S"), that eight persons were affected, that the operator's negligence was high, and that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard. A civil penalty in the amount of $4,099.00 was assessed for this violation.

Big Ridge contends that there was no violation, and challenges the negligence and unwarrantable failure findings, as well as the amount of the proposed penalty.

The Violation

Unit 3 of Big Ridge's WLPM consisted of a "super-section," i.e., two mechanized mining units ("MMUs") operating on separate splits of air. MMU 013 was on the left side and MMU 003 was on the right. Eight entries were being mined, numbered from right-to-left facing inby. Ventilation air in the 013 MMU was coursed inby in the intake entries, entries #4 and #5, traveled across the faces and out the #8 return entry. Big Ridge's approved ventilation plan specified that a "minimum of 20,000 cfm [cubic feet per minute] will be maintained in the last open cross-cut with two or three open cross-cuts."[3] Tr. 80-81; Ex. G-3 at 2. Diagrams of "typical face ventilation" schemes were included in the plan. An asterisk on the diagrams showed the location where the required air reading was to be taken, which was in the most inby cross-cut in the line of stoppings separating the return air course from the intake and neutral air courses. For the 013 MMU, the location was in the most inby crosscut between entries #7 and #8. Tr. 80-82; Ex. G-3 at 5, 6. The diagrams were consistent with the definition of "last open crosscut" in the Secretary's regulations, which state: "The last open crosscut is the crosscut in the line of pillars containing the permanent stoppings that separate the intake air courses and the return air courses." 30 C.F.R. § 75.360(c)(1).

The layout of MMU 013 as of September 11, 2009, is depicted on a map of the section. Ex. G-4. At that time, mining was advancing only on entries #1 through #6. On September 9, 2009, the 013 MMU had holed into old works that had been mined in January of 2009, and the extensions of entries #7 and #8 had been mined months earlier to a point six crosscuts inby.[4] At the time of the inspection on September 11, entries #4 through #6 had been advanced an

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[3] The reference to "two or three open crosscuts" expresses a requirement that permanent stoppings had to be constructed in all but the three most inby crosscuts separating the intake and return air courses. See 30 C.F.R. § 75.333(b)(1).

[4] A color-coded map of that area of the mine, depicting areas developed at different times was introduced into evidence by Big Ridge. Ex. R-10.

additional four crosscuts, and the continuous miner was in the #6 entry. Entry #7 was separated from entry #8 by permanent stoppings, with the exception of two open crosscuts. The most inby crosscut, the last open crosscut, was designated 106+98. The next crosscut outby was designated crosscut 106+20. Crosscut 106+98 was a normal-sized crosscut. However, crosscut 106+20 had been mined to a height of 12-14 feet, to accommodate a belt. Consequently, it could not be easily closed-off with a check curtain. Ventilation air flowed across the working faces, and through a crosscut to entry #7. It then flowed inby in entry #7 and over to the #8 return entry through the two open crosscuts, restricted only by any check curtains hung in the crosscuts. No mining had been conducted in the #7 and #8 entries since the old works had been holed into on September 9. While it is not unusual to develop return entries in advance of other entries, it was unusual to hole into old "stubbed off" works. Chad Barras, safety director for the Midwest Division of Peabody Energy, Big Ridge's parent company, testified that old mains or works were mined into only about once a year.

Daniel Dixon was the Unit 3 midnight shift foreman who conducted the preshift examination for the oncoming day shift on September 11, 2009. He measured return air flow on the 013 MMU at 18,900 cfm, less than required under the ventilation plan.[5] His "low air" reading was called out and recorded on the preshift examination book. Ex. G-5. He also called Thomas Myers, Jr., an assistant mine manager on the midnight shift, and reported the low air reading to him.

Myers went to the section to investigate and correct the low air problem, so that the oncoming day shift - a production shift - could mine coal. He took an air reading and measured the flow at 20,674 cfm, sufficient to proceed with mining. Tr. 140, 148. Myers did not adjust curtains or take any other steps to increase air flow. He explained that he used a "Davis Anemometer," which he has found gives him a "better" reading, and often produces an acceptable result where measurements made by other means showed problems. Tr. 149-50. Myers did not take his measurement in the last open crosscut. Rather he took it in the#7 entry just outby crosscut 106+20, the next-to-last open crosscut, and indicated the location by placing a green dot on a map of the section. Tr. 137-38; Ex. G-4. He believed that it was reasonable to take the reading at that location because the #7 and #8 entries were part of the old works and all of the return air that had ventilated the working faces, through entry #6, had to flow through the #7 entry at that location before it flowed through crosscuts 106+20 and 106+98 into entry #8. Tr. 138.

Roy Shavez, the oncoming Unit 3 day-shift foreman, saw the low air notation on the preshift examination book when he reviewed it prior to the start of the shift. Tr. 164. He met Myers as he arrived on the section. Myers told him that the low air had been corrected, and

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[5] Dixon testified that he took his air reading in the last open crosscut, 106+98, and that there may have been a curtain at least partially closing off crosscut 106+20. Tr. 130-31. He agreed that if crosscut 106+20 would have been completely open, that the flow in crosscut 106+98 would have been substantially reduced, well below the 18, 900 cfm he measured. Tr. 132.

discussed with him the location where air readings should be taken. Tr. 166. Shavez instructed his crew to tighten ventilation curtains and double them if necessary; he then worked on curtains himself. He took an air reading in the #7 entry, where Myers had taken his, and measured more than 20,000 cfm before he started mining.[6] Tr. 169-70.

When Ramsey arrived at the mine for the inspection, he reviewed the books in which results of preshift and onshift examinations were recorded. He noted that "low air" had been reported on Unit 3 during the preshift examination immediately prior to the beginning of the day shift, i.e., the measured air flow was less than the required 20,000 cfm. Tr. 96-99, 110; Ex. G-5. He traveled to the section and inspected the area of the crosscuts between entries #7 and #8, and found a check curtain hung in the last open crosscut, 106+98. The next outby crosscut, 106+20, which should have been closed off with a check curtain or a permanent stopping, was completely open. The combination of the open crosscut at 106+20 and the check curtain in 106+98 resulted in a substantially reduced flow of air in the latter. Ramsey measured the flow in crosscut 106+98 at 7,371 cfm, well below the 20,000 cfm required under the ventilation plan for active mining, which was ongoing during his inspection. Tr. 85. He concluded that there was insufficient air flowing to the faces in entries #7 and #8, and that WLPM was operating in non-compliance with its ventilation plan.

Ramsey testified that he spoke with the day-shift foreman, Shavez, who informed him that he had taken air readings in the next-to-last open crosscut, 106+20 and, while he denied hanging the curtain in crosscut 106+98, stated that it had been hung because the roof in crosscut 106+20 was too high to hang a check curtain. Tr. 90-91. Shavez denied knowledge of the curtain in crosscut 106+98, and explained that he told Ramsey, in response to a question, that the curtain may have been hung there because crosscut 106+20 was too high. Tr. 171-75. He speculated that one of his men may have hung the curtain in crosscut 106+98 when they were trying to improve ventilation at the start of the shift and that, if he had seen it, he would have taken it down because it would reduce overall air flow. Tr. 171-73, 182-83, 189. Rodney Shires, a union representative who accompanied Ramsey, confirmed the presence of a check curtain in crosscut 106+98, and corroborated Shavez's description of his conversation with Ramsey, i.e., he was speculating as to the reason the curtain had been hung there. Tr. 117-20; Ex. G-21.

In order to abate the violation, a scoop was parked in crosscut 106+20 and de-energized. The crew then stood on the scoop, hung check curtains from the roof and draped curtains over the scoop. That closed off the crosscut, forcing sufficient air through crosscut 106+98. The abatement process took about 15 minutes. Tr. 103.

Respondent argues that crosscut 106+98 was not the last open crosscut because it did not separate intake from return air. Respondent also argues that the ventilation plan diagrams, on

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[6] Shavez also took an air reading in crosscut 106+20. Exactly when he took that reading, as well as the results, are not clear. He relied on the reading taken in entry #7 to establish that there was sufficient air flow. Tr. 169-71.

which the location for the air reading is specified, depict "typical" mining schemes, and that mining on the 013 MMU was not typical because the unit had mined into old works. Neither argument is persuasive.

Respondent's first argument ignores major components of the regulatory definition. As noted below, ventilation air became return air once it passed entry #6, the last working place on the section. Respondent argues that crosscut 106+98 was not the last open crosscut because it did not separate intake from return air. However, as previously noted, section 75.360(c)(1) specifies that: "The last open crosscut is the crosscut *in the line of pillars containing the permanent stoppings* that separate the intake air *courses* and the return air *courses*." (emphasis supplied). Entry # 8 was the return air course, and entries #4 through #7 were either intake or neutral air courses. The line of stoppings separating entry #8 from the other entries ran up the line of pillars between entry # 7 and entry #8, and the last open crosscut had to be in that pillar line. The fact that the air entering entry #7 was return air does not alter that conclusion.

As to the second argument, Barras opined that the ventilation plan did not address a situation where old works were holed into because Big Ridge was not then mining in a typical situation. He further explained that at the time there was no requirement to submit new ventilation plans when old works were encountered. It was not until August 2010 that MSHA issued a Program Information Bulletin clarifying the term "air changes" and requiring the submission of plans addressing ventilation issues when holing into old works.[7] Tr. 200. However, Barras agreed that return air measurements are typically taken in a crosscut in the line of stoppings separating the return air course from other air courses. Tr. 202-03. Myers and Shavez testified that taking the air measurement in the #7 entry just outby crosscut 106+20 was reasonable because all of the return air that had ventilated the working faces had to pass through that location. Tr. 138-39, 167. Return air is defined in the Secretary's regulations, in part, as "air that has ventilated the last working place on any split of any working section." 30 C.F.R. § 75.301. Since the face in entry #6 was the last working face, ventilation air became return air once it passed the continuous miner in entry #6. Tr. 106-07, 147, 180, 206. However, Myers and Shavez conceded that nothing in the ventilation plan sanctioned taking the air reading in the #7 entry. Tr. 146, 178-79.

The approved ventilation plan specified that the required air reading was to be taken in the last open crosscut, in the line of stoppings separating the return entry from the other entries, i.e., in crosscut 106+98. Big Ridge did not take readings in that location; rather a check curtain had been hung there. The actual air flow in the last open crosscut, as measured by Ramsey, was 7,371, well below the required 20,000 cfm. While the ramifications of taking the measurements in the #7 entry were minimal, or non-existent, Big Ridge's actions were not in compliance with the ventilation plan. I find that Big Ridge failed to comply with its approved ventilation plan, in violation of the standard.

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[7] See MSHA Program Information Bulletin No. P10-13, August 16, 2010. http://www.msha.gov/regs/complian/PIB/2010/pib10-13.asp.

Unwarrantable Failure - Negligence

In *Lopke Quarries, Inc.,* 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id*. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek* [*Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).
>
> Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

On the face of it, this is almost a classic case of unwarrantable failure. An assistant mine manager and a section foreman, both agents of Big Ridge, took critical air readings at a location that was not in conformance with the ventilation plan. Had readings been taken at the specified location they would, at least technically, not have been sufficient to allow mining, which Respondent was doing at the time. It had to have been obvious that the readings were not taken in the last open crosscut. The "speculative" response by Shavez, to the effect that the curtain in crosscut 106+98 may have been hung because the roof in crosscut 106+20 was too high to close off with a curtain, was undoubtedly accurate. Big Ridge's foremen were almost certainly taking the return air reading in crosscut 106+20, or in entry #7, for that reason. In fact, it is highly likely that Dixon took his reading there, rather than in crosscut 106+98, because there was no means of closing crosscut 106+20 sufficiently to allow him to get anywhere close to the 18,900 cfm he measured when he conducted the preshift examination. Tr. 132.

However, it is apparent that the mining situation became atypical when the old works were holed into on September 9. It is likely that there were initially five open crosscuts between entries #7 and #8 in the old works. Stoppings were built up to crosscut 106+20, and one should have been built in that crosscut if it could not have been effectively closed with curtains. However, it posed problems because of its height, and Big Ridge did not plan to be mining in that area much longer. In fact, mining in the area ceased on September 15, four days after the inspection. Tr. 198. Meyers and Shavez were correct in concluding that taking the measurement in entry #7 just outby crosscut 106+20 would provide an accurate measurement of the return air that had ventilated the reduced number of working faces. If crosscut 106+98 had been effectively closed with a check curtain, an accurate reading could also have been obtained in crosscut 106+20, although that too would not have been a permissible location under the ventilation plan.

I find that when the 013 MMU holed into the old works, Big Ridge was confronted with an unusual situation, there would have been at least five open crosscuts between entries #7 and #8, and the next-to-last crosscut, 106+20, had a much greater height than the others. Rather than erect ventilation controls that would have forced the air flow through the last open crosscut, it decided to measure the return air in the #7 entry, or in the 106+20 crosscut, for the few days it would be mining in that area. While the location in the #7 entry provided an accurate measurement of the return air flow, it clearly was not in the last open crosscut, as required by the plan.

Big Ridge argues that it acted in good faith, on an objectively reasonable belief that it was actually in compliance with the applicable law, and that its conduct cannot be considered to be the result of unwarrantable failure if it is later determined that its belief was in error. *See IO Coal Co.*, 31 FMSHRC 1346, 1357-58 (Dec. 2009). The argument is rejected. Any belief that air readings were being taken in the last open crosscut, which was required under the plan, could not have been reasonable, and it is questionable whether those taking the readings could have believed, in good faith, that they were complying with the plan. However, I find that Big Ridge's agents had a good faith and objectively reasonable belief that the readings accurately measured the flow of return air that had ventilated the working faces. I find Big Ridge's

negligence with respect to the violation to have been high, at least as to the technical violation of failing to take the measurements in the last open crosscut.

An important factor in the unwarrantable failure analysis is the degree of danger posed by the violation. *IO Coal*, 31 FMSHRC at 1355; *Spartan Mining Co*. 30 FMSHRC 699, 714-15, 722 (Aug. 2008) (damaged cable presented a condition of high danger to miners, failure to withdraw miners after mine fan went out exposed miners to obvious danger and serious hazards). Here, there was no degree of danger to miners posed by the violation because the location where the measurements were taken provided accurate readings of the volume of air ventilating the working faces, which was the intent of the ventilation plan's requirement.

Ramsey was concerned that most of the air was short circuiting through the 106+20 crosscut, and there was insufficient air ventilating the #7 and #8 faces. Tr. 84. The purpose of requiring 20,000 cfm of return air is to assure the dilution and removal of methane, dust and other noxious gases generated in the mining process. Most of the methane and dust is produced during active mining. Tr. 139. After the hole-through, there was no active mining in the #7 and #8 entries. They had been mined months before. The measurements taken by the foremen and Meyers assured that there was a minimum of 20,000 cfm of air flowing across the working faces, such that dust, methane and other gases were effectively disbursed. Ramsey concluded that the violation was unlikely to result in an injury because, despite the fact that the mine liberated over one million cubic feet of methane in a 24-hour period, he detected no methane in the area. No mention was made of dust or other accumulations, and there is no evidence that mining was conducted at any time when the return air flow was less than the 20,000 cfm specified in the ventilation plan. I find that the violation posed no probability of injury, and that no persons were affected.

The violation was not extensive, Big Ridge had not been put on notice that additional compliance efforts were necessary, and pre-order effort to abate the condition is not a relevant factor here.

On the facts of this case, I find that, while Big Ridge's negligence in failing to comply with its ventilation plan was high, it did not rise to the level of unwarrantable failure.[8] The absence of danger to miners is a very important consideration. While Big Ridge's actions did not conform to the plan, they were correctly calculated to assure that the plan's objective of 20,000 cfm of air flow across the working faces was fulfilled. Its actions cannot properly be characterized as indifference, serious lack of reasonable care, or reckless disregard for the safety of miners.[9]

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[8] The Commission has recognized that a finding of high negligence suggests an unwarrantable failure. *San Juan Coal Co.*, 29 FMSHRC 125, 136 (March 2007) (citing *Eagle Energy Inc.*, 23 FMSHRC 829, 839 (Aug. 2001)).

[9] Had there been active mining in the #7 and # 8 faces, the violation would have posed
(continued...)

Order No. 8417559

Order No. 8417559 was issued by inspector Morris at 11:00 a.m., on September 14, 2009, pursuant to section 104(d)(2) of the Act. It alleges a violation of 30 C.F.R. § 75.400, which requires that "Coal dust, including float coal dust deposits on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment. The violation was described in the "Condition and Practice" section of the Order as follows:

> Combustible materials, in the form of hydraulic oil, has been allowed to accumulate in the cross cut at the surveyor's station #97+33 where the temporary diesel fuel station for the Main West is located. Oil up to 3 inches in depth for a distance of approximately 40 feet and a width of from 1 to 3 feet is present in this cross cut. This violation is an unwarrantable failure to comply with a mandatory standard.

Ex. G-7.

Morris determined that it was unlikely that the violation would result in an injury, that any injury would result in lost work days or restricted duty, that the violation was not S&S, that six persons were affected, that the operator's negligence was high, and that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard. A civil penalty in the amount of $4,810.00 was assessed for this violation.

The Violation

Morris was conducting the latter stages of the quarterly inspection of the WLPM in mid-September 2009. On the day in question he was accompanied by miners' and company representatives when he inspected a temporary fuel station adjacent to the Main West travelway. The station consisted of a portable car or trailer with two tanks mounted on it, one containing diesel fuel and the other containing hydraulic oil. The car/trailer was positioned in a crosscut just off the travelway. Miners using the station would pump oil or fuel from the temporary station's tanks into cans and take it to equipment parked in the travelway.

The crosscut extended from the south rib of the travelway approximately 50 feet to a stopping. The trailer was about nine feet wide and 20 feet long and was adjacent to the east rib of the crosscut. Morris observed a pool of hydraulic oil along the west rib of the crosscut. It ranged up to three inches deep, one-to-three feet wide and approximately 40 feet long, and

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[9](...continued)
a degree of danger to miners and Big Ridge's conduct would have easily qualified as an unwarrantable failure.

extended to within five feet of the travelway rib. The pool of oil was depicted in a sketch in Morris' notes. Tr. 16-18, 21-23; Ex. G-20.

Morris determined that the oil was combustible material that had been allowed to accumulate in violation of the standard. He also determined that the accumulation would propagate a fire or explosion, but that it was not likely to result in an injury because there was no ignition source present. Any injury to affected persons, the six-person mining crew, would have entailed lost work days or restricted duty.

Big Ridge challenges the unwarrantable failure designation as well as the amount of the assessed penalty.[10]

Unwarrantable Failure

The Secretary argues that the unwarrantable failure designation should be sustained because the condition was extensive, obvious to management and mine personnel, existed prior to the start of the shift, and the mine had a significant history of accumulations violations that should have put it on notice that greater compliance efforts were necessary. Big Ridge disputes each of the Secretary's arguments.

The extent of the condition

The pool of oil was approximately 40 feet long, one to three feet wide and up to three inches deep. It ran along the west rib of the crosscut, and extended to within about five feet of the travelway's south rib. The floor of the mine in the crosscut declined in two planes, toward the west rib and toward the stopping. Tr. 33. Consequently, the deeper and wider portions of the pool would most likely have been at the stopping end of the crosscut, some 45 feet away from the edge of the travelway. The condition was abated by applying rock dust to the pool of oil, because there was no other means to remove it. Tr. 33. Miners had to "go out and get the rock dust" and it took five men a total of 40 minutes to abate the condition. Tr. 33. It is likely that most of that time was devoted to obtaining the rock dust. Considering the size and location of the pool, and that the higher end, nearer the travelway, was most likely of minimal depth, I find that the violation was not extensive, at least to the point of being an aggravating factor in the unwarrantable failure analysis.

Obviousness – duration – knowledge of mine management

Morris believed that Big Ridge knew or should have known of the violation because several members of management had inspected and/or passed the fuel station while the pool was there. While he agreed that he did not know how long the pool had been there, he believed that it would have taken a considerable amount of time to accumulate that volume of oil. Tr. 23. The

[10] While it identified gravity as an issue in its brief, its argument was directed to the unwarrantable failure and negligence designations.

Secretary contends, and I agree, that the pool would have existed substantially as Morris saw it, when the preshift examination for the day shift was conducted, i.e., at least one shift. Daniel Dixon, the midnight shift foreman, conducted the preshift examination, but did not see the oil pool. Tr. 54. He did see three pallets of oil cans stored in the crosscut that would have been close to the area where the pool was depicted on Morris' sketch. Tr. 52-53, 58-59. He was aware that Big Ridge was "transitioning" from use of cans to tanks, because citations had been issued for conditions related to the presence of cans. He directed that the pallets be removed, and they apparently had been removed prior to issuance of the order. Tr. 52-54.

As to the presence of managers other than Dixon, shift foremen typically drove man trips into and out of the section at the shift change, and Morris had passed two mine managers exiting the mine, who would have driven past the fuel station on their way into and out of the mine. Tr. 20-24. However, it is highly unlikely that the pool of oil would have been seen by an individual passing by in the travelway. The travelway and crosscut were not lit. Consequently, lights on mobile equipment and miners' cap lamps provided the only illumination, and there was no light source at the stopping end of the crosscut that could have reflected off the surface of the pool. Tr. 43. Morris conceded that operators of mobile equipment using the travelway would have to focus on roadway and roof conditions, and that Big Ridge had trouble maintaining some travelways such that there was no "right-hand side going in; left-hand side coming out" travel pattern because equipment typically had to maneuver side-to-side. Tr. 47. Morris agreed that equipment operators who would have entered the crosscut to use the fuel station were "almost all" hourly employees. Tr. 33. While Morris believed that there were some salaried personnel who operated such equipment, there is no evidence that such individuals would have been at the fuel station while the pool of oil existed.

Morris testified that he saw the pool of oil as soon as he "walked over" to the fuel station, i.e., it would have been illuminated with his cap light. Tr. 34. Notes taken by Big Ridge's representative, who no longer worked for Big Ridge, indicated that it took Morris "20 minutes to find" the oil pool. Tr. 66; Ex. R-13. I place virtually no weight on that evidence. I find that the pool should have been seen when illuminated by the cap lamp of a miner walking into the crosscut, but not by personnel driving by the crosscut in the travelway. Dixon should have seen the pool when he conducted the preshift examination. However, his attention was apparently focused on the pallets of cans, which may have obstructed his view of the pool to some extent. He did take steps to address conditions in the crosscut, which evidences effort on the part of Big Ridge to attend to the presence of combustible materials stored in that location. I find the length of time the violation existed, obviousness, and management knowledge factors to be only slightly aggravating in the unwarrantability analysis.

Notice of need for greater compliance efforts

Morris had printed out a history of violations for the WLPM that showed the issuance of over 150 violations of section 75.400 from January through September 2009. Tr. 25-28; Ex. G-10. Morris had given Big Ridge verbal warnings about accumulations violations, and had increased the negligence designations on such violations to "high" because such violations had been issued on more than three or four occasions. Tr. 28-29. However, many of the violations

on Morris' listing remained in contest. Tr. 40-42. The listing addressed all section 75.400 violations, a very broad standard that included coal accumulations along belts and on mobile equipment, as well as possible accumulations of trash. Tr. 40-41. Morris did not recall, and the listing did not indicate, whether any of the previous accumulations violations involved temporary fuel stations or pools of oil. Tr. 40-42, 44-45.

The Secretary need not prove the issuance of "violations involving the same regulation and occurring in the same area within a continuing time frame" in order to establish prior notice. *IO Coal Co. Inc.*, 31 FMSHRC at 1354; *San Juan Coal Co.*, 29 FMSHRC at 131. Nevertheless, the Secretary's position would be strengthened considerably where some nexus between prior violations and the subject violation can be shown, e.g., a relevant consideration might be whether increased compliance efforts in response to the previous violations would have addressed the subject condition. I have previously held that, in order to establish that an operator had been put on notice that additional compliance efforts were needed to address a certain type of accumulation, the Secretary was required to show more than a history of prior citations for violations of that broad standard. *Cumberland Coal Resources, LP*, 31 FMSHRC 137, 156 (Jan. 2009) (ALJ) (unrelated finding reversed, 32 FMSHRC 442 (May 2010)). Here, as discussed *infra*, the accumulations violations appear to have generally involved coal fines and similar materials, a substantial number having occurred on mobile equipment. The accumulation in question, a pool of oil at a temporary fuel station, was somewhat unique and likely would not have been addressed by compliance efforts directed toward the previously cited conditions. I find the prior notice factor here to be neutral.

Danger to miners

As noted previously, whether the violative condition posed a high degree of danger to miners is an important element in the unwarrantability analysis. Morris determined that the violation was unlikely to result in a lost work days or restricted duty injury, and that it was not S&S. The accumulations did not pose a high, or even a significant, degree of danger to miners.

Conclusion

As noted above, the length of time the violation existed, obviousness, and management knowledge factors weigh slightly in favor of a finding of unwarrantability. Pre-order abatement effort is not a relevant factor, and the extensiveness and notice of a need for greater compliance effort factors are neutral. Weighing heavily against an unwarrantability finding is the fact that the violation did not pose a high degree of danger to miners. On consideration of all relevant factors, I find that the violation was not the result of Big Ridge's unwarrantable failure, but that its negligence was moderate.

Order No. 8417566

Order No. 8417566 was issued by Morris at 7:35 a.m., on September 16, 2009, pursuant to section 104(d)(2) of the Act. It alleges a violation of 30 C.F.R. § 75.400, which was described in the "Condition and Practice" section of the Order as follows:

> The company #DT-07 diesel truck, located on the surface, has an accumulation of combustible materials, in the form of oil, oil saturated coal fines and loose coal, diesel fuel and diesel fuel saturated material on it. The accumulations range from a film of oil and diesel fuel to approximately 1 inch of oil and diesel fuel saturated coal fines, loose coal, and materials and are present in the engine and transmission compartments, the hydraulic tank and the fuel tank. This is an unwarrantable failure to comply with a mandatory standard.

Ex. G-11.

Morris determined that it was unlikely that the violation would result in an injury, that any injury would result in lost work days or restricted duty, that the violation was not S&S, that four persons were affected, that the operator's negligence was high, and that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard. A civil penalty in the amount of $4,000.00 was assessed for this violation.

Big Ridge challenges the high negligence and unwarrantable failure designations, as well as the amount of the penalty.

The Violation

Morris was conducting the final stages of the regular quarterly inspection of the WLPM, and made a special effort to identify and inspect pieces of mobile equipment that had not yet been inspected. Tr. 208. He was accompanied by Bill Shover, a miners' representative, and Bob Clarida, a safety and compliance officer for Big Ridge. Big Ridge kept a log of equipment that had been inspected, and knew what equipment needed to be inspected by the end of the quarter, which was two weeks away. Tr. 211. While on the surface, Morris observed a diesel truck that had yet to be inspected, a DT-07 open-type, four-man personnel transport. Miners were waiting while the vehicle was being fueled before going underground.

Morris inspected the DT-07 and observed the conditions noted in the order. Accumulations up to one inch deep of oil, oil-saturated coal fines and loose coal, diesel fuel and material saturated with diesel fuel was on the fuel tank and in the engine and transmission compartments. He determined the depth of the accumulations by pushing a rod into them and measuring the residue with a tape measure. The accumulations on the fuel tank, most likely dust and other such material that stuck to residue of spilled diesel fuel, were apparent as the vehicle was being fueled. Morris lifted the hood of the truck, which rendered the accumulations in the engine and transmission compartments readily observable. He believed that those accumulations would have been obvious to anyone conducting a pre-operational check on the vehicle. Tr. 212. He was "certain" that the vehicle had been used in that condition because it was in use at the time, was about to be taken underground, and because personnel transports were in short supply, partially because of Big Ridge's use of "hot seat" shift changes. Tr. 213-14.

As Big Ridge apparently concedes, the accumulations violated the standard.

Unwarrantable failure - negligence

Need for greater compliance efforts

The Secretary's strongest argument on the unwarrantable failure issue is that Big Ridge had been put on notice of a need for greater compliance and knew that this piece of equipment would be inspected before the end of the quarter, yet failed to assure that the standard was complied with. She points to the previously discussed evidence of some 172 accumulations violations having been issued between January 1 and September 16, 2009. Tr. 215; Ex. G-10. Morris reiterated his testimony that the number of accumulations violations had led to higher negligence findings, and further escalated to the issuance of orders under section 104(d) of the Act. Big Ridge again counters that violations issued under the broad accumulations standard do not establish prior notice for unwarrantable failure purposes.

In general, I agree that mere numbers of prior citations of the broad accumulations standard may not be sufficient to establish a need for greater compliance efforts with respect to a particular accumulations violation, e.g., the pool of oil at the temporary fuel station. However, here the Secretary's evidence went much further. Morris had been involved in all of the inspections in 2009 and was familiar with the violation history, which included specific warnings about accumulations violations on mobile equipment. Throughout the 2009 inspections there had been discussions with Rig Ridge management about accumulations violations on equipment. Tr. 15. At the close of each quarter, a closeout conference was held with Big Ridge managers to review citations issued during the quarter and discuss areas of concern. The lead MSHA inspector usually led the conference, and prepared a closeout document presenting MSHA's findings during the quarter. The closeout document for the second quarter, January 1 through March 31, 2009, noted an increase from 29 to 97 in the number of section 75.400 violations issued in the first and second quarters. Tr. 218; Ex. G-13. The section entitled "Areas of Concern" referenced an increase of 234% in accumulations violations over the last quarter, and highlighted that "Most of these violations occurred on mobile equipment." Ex. G-13 at 11. Item 5 in that section further addressed the problem of oil leaks and accumulations on diesel equipment. *Id*. The Secretary introduced copies of 17 section 75. 400 violations involving mobile equipment that had been issued to Big Ridge during the last inspection quarter, prior to Morris's order. Ex. G-14. Clarida confirmed that Morris "had talked about seeing dirty equipment before and that we had had so many 400s written on this," and that Morris "had mentioned it before about washing the equipment and so on." Tr. 274, 290.

Big Ridge protests that the bulk of the Secretary's evidence pertains to "face" equipment which operates in an environment where coal dust and fines are more likely to be encountered, and that the evidence of a history of accumulations violations on mobile equipment should not establish prior notice with respect to surface equipment. Resp. Br. at 30-31. Big Ridge attempts to draw too fine a line between the types of mobile equipment that were subject to prior enforcement actions. There was a significant increase in accumulations violations from the first to the second quarter. Many of those violations involved mobile equipment, such that the topic

of accumulations on mobile equipment became a focus of the quarterly closeout meeting, and was specifically identified as an issue that required increased attention by Respondent. While the vast majority of citations issued in the quarter, 223 out of 226, had been issued underground, the references to accumulations on mobile equipment were not restricted to face equipment and there is no indication that the discussions were so limited. A significant portion of the DT-07 truck's operation no doubt occurred underground. The Secretary presented ample evidence that Big Ridge had been placed on notice that greater compliance efforts were necessary with respect to accumulations on mobile equipment.

Efforts to abate conditions subject of prior notice

Having been placed on notice of a need for greater compliance efforts, Big Ridge's response to such notice becomes a relevant factor in the unwarrantable failure analysis. *San Juan Coal*, 29 FMSHRC at 134. There is virtually no evidence that Big Ridge took any steps to address the high incidence of accumulations violations on mobile equipment until after this order had been issued. It had retained a contractor to wash equipment on a weekly basis, a cleaning effort that had failed to prevent the numerous accumulations violations. Tr. 325. It was not until after the September 16 and 17 orders were entered, that it purchased a power washer and installed it in a crosscut underground, where equipment operators could stop and wash equipment as needed. Tr. 325. Also after the orders were entered, it implemented a "dripper" program, designed to repair leaks in equipment hydraulic systems that resulted in saturated deposits of coal fines and other materials. Tr. 277-78, 286. However, there is no evidence that any similar steps were taken between the second quarter closeout meeting and the time the order was entered on September 16, 2009.

Commission precedent reflects that an operator's effort to abate violative conditions can be relevant in two ways. An operator may be put on notice of a compliance problem in a certain area through a recent history of violations, e.g., as here, a recent history of accumulations violations on mobile equipment, and/or warnings from MSHA inspectors about such violations. *IO Coal Co. Inc.*, 31 FMSHRC at 1353. The priority that a mine operator placed on addressing such a problem area prior to the issuance of the violation at issue is a relevant unwarrantability consideration. *Id*. 31 FMSHRC at 1356. *San Juan Coal Co.*, 29 FMSHRC at 134. An operator may also have actual or constructive notice of the specific violative condition before it has been cited. *IO Coal*, 31 FMSHRC at 1356-57. In such cases, the operator's efforts to abate that condition, e.g., whether the abatement effort was subordinated to other work, may support an unwarrantable failure finding. *San Juan Coal*, 29 FMSHRC at 134-35.

Here, the Secretary established that Big Ridge had prior notice of a problem with accumulations on mobile equipment, and that it made no effort to abate such conditions prior to the issuance of the order.

Extensiveness - obviousness - knowledge of the mine operator

The violative condition was neither extensive, nor obvious. While there was some material, most likely dust or dirt, saturated in a film of spilled diesel fuel on the fuel tank, the more significant accumulations were apparent only after the hood of the engine compartment had been raised and the door to the transmission compartment had been opened. Tr. 208-09, 212-14. Those actions would normally have been taken by an equipment operator performing a pre-operational check. However, there is no mandatory standard requiring pre-operational checks of mobile equipment used in underground coal mines. Tr. 242. Consequently, unlike required preshift examinations, where the examiner is considered an agent of the operator, the observations of an hourly equipment operator conducting a pre-operational check of mobile equipment are not attributable to the mine operator. The accumulations in the engine/transmission compartment ranged up to one inch in depth. The material on the fuel tank was apparently more of a film of saturated dust. These conditions overall were not extensive, and were not obvious such that they reasonably should have been observed by management personnel. There is no evidence that the mine operator was aware of the condition prior to the issuance of the order.

Danger to miners

The accumulations violation did not pose a high degree of danger to miners. Morris determined that the violation was unlikely to result in an injury because there was no ignition source for the accumulations. Tr. 210. If an injury were to occur, it would have resulted in lost time or restricted duty. Morris determined that four persons were affected by the violation because there were four miners about to ride on the equipment. It appears unlikely that all four miners would have been affected if the accumulations had been ignited. There was relatively little combustible material, and any fire would most likely have been extinguished without major incident. Morris' injury evaluation was based upon possible smoke inhalation by the miners. Tr. 255. However, he agreed that they would most likely simply have moved to the side of the vehicle upstream in the prevailing air flow, thereby avoiding that hazard. Tr. 255. I find that the violation was unlikely to result in a lost work days or restricted duty injury and that one miner was affected.

Duration of violation

Morris was told that the material had accumulated for two to three days. Tr. 239. Big Ridge conducted weekly checks of equipment. The DT-07 truck had last been checked on September 14, two days earlier, and no problems were noted. Tr. 275; Ex. G-18. Clarida opined that if the accumulations were present when the equipment was checked on the 14th, that they would have been noted and corrected. Tr. 275. I accept that testimony, and find that the accumulations occurred over the period, September 14 to 16, gradually building up to the degree observed by Morris. The time when the deposits would have risen to a level sufficient to qualify as unlawful accumulations is unknown, but most likely would have been relatively close in time to when the violation was issued.

Conclusion

Big Ridge argues that Morris based his unwarrantable determination solely on the prior notice provided by the history of violations and discussions with MSHA, and that an unwarrantable failure finding cannot be based upon one factor. Its argument is unavailing for two reasons. First, the determination of whether a violation was the result of an unwarrantable failure is not restricted to consideration of the factors relied on by the inspector, or even to those urged by the Secretary. *San Juan Coal*, 29 FMSHRC at 129. That determination must be based upon a consideration of all relevant evidence introduced at the hearing, and the factors identified by the Commission as being relevant to the determination. Big Ridge supported its second point by citing *Windsor Coal*, 21 FMSHRC 1001 and *San Juan Coal*, 29 FMSHRC at 129-36. However, those cases do not state that an unwarrantable failure finding may not be based upon one of the pertinent factors. Rather, like numerous other cases including *IO Coal*, they instruct that a Judge may not base a determination of unwarrantable failure on consideration of one factor "to the exclusion of others." All pertinent factors must be considered, and it is possible that one factor may predominate on the facts of a particular case.

The factors weighing in favor of a finding of unwarrantable failure are that Big Ridge was put on notice that greater compliance efforts were needed to address accumulations on mobile equipment and that it failed to implement measures to address such problems prior to the issuance of the order. Factors weighing against an unwarrantable finding are; the violative condition was not extensive; the condition had not existed for a significant length of time; the condition was not obvious; Big Ridge had no knowledge of the condition; and the condition posed relatively little danger to miners.

On the facts of this case, I find that the violation was not the result of Big Ridge's unwarrantable failure. While the prior notice considerations are substantial, they are outweighed by the other factors, especially Big Ridge's lack of knowledge and the absence of any significant danger to miners. Based on Big Ridge's unresponsiveness to notice of accumulations problems on mobile equipment, I find that its negligence was high.

Order No. 8417568

At 8:30 a.m. on September 17, the day after Morris issued the previous order, he issued Order No. 8417568 pursuant to section 104(d)(2) of the Act, also alleging a violation of 30 C.F.R. § 75.400. The violation was described in the "Condition and Practice" section of the Order as follows:

> An accumulation of combustible materials, in the form of oil and oil saturated coal fines and other material, is present on the company #ST-04 diesel Getman tractor, located on the surface. The accumulations range from a film of oil to approximately 1/2 inch of standing oil to approximately 1 inch of saturated coal fines and other materials. The accumulations are present in the operator's compartment, the engine compartment, transmission

> compartment, and on most of the outside of the tractor. There are numerous oil leaks that must be repaired to terminate this order. This is an unwarrantable failure to comply with a mandatory standard.

Ex. G-16.

Morris determined that it was reasonably likely that the violation would result in an injury, that any injury would result in lost work days or restricted duty, that the violation was S&S, that one person was affected, that the operator's negligence was high, and that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard. A civil penalty in the amount of $11,597.00 was assessed for this violation.

Big Ridge challenges the S&S and unwarrantable failure designation, as well as the amount of the penalty.

The Violation

As noted previously, on September 17, Morris was in the process of completing the mine's quarterly inspection, and was focusing on mobile equipment that had not yet been inspected. He was again accompanied by Clarida and Shover. While on the surface, he approached a Getman tractor, company number ST-04, and prepared to inspect it. However, he deferred the inspection for 10-15 minutes to allow the operator to tow a trash car underground, and proceeded to inspect a diesel truck and a diesel scoop, which he found to be in compliance with applicable regulations. When the tractor returned to the surface, he inspected it and found the conditions noted in the order. The inspection took about 30 minutes. When it was finished, the equipment was moved, and Morris observed a pool of oil in an area approximately three and one-half by six feet where the tractor had been parked. He believed that the oil had leaked from the tractor during the 30-minute inspection. Tr. 228-29; Ex. G-17.

Morris was concerned that the equipment had been operated with such a significant leak, and with the accumulations that he observed. The equipment operator, Korby Kirkman, stated that the equipment was in that condition when he started his trip down the slope, and that the operator on the midnight shift had started to wash it before he got it. Ex. G-17. Morris suggested to Clarida that higher management officials come and observe the conditions. Terry Ward, general mine manager, and Ricky Phillips, the superintendent, examined the tractor, and Phillips took pictures of the conditions. Both stated that they could not defend the conditions. Tr. 237-38; Ex. G-17. Phillips stated that they had met with the midnight shift crew after the order had been entered the previous day, and instructed them to wash the equipment. Tr. 238-39. He also stated that he was going to call the miner who had operated the tractor on the midnight shift and fire him. Tr. 238.

Morris then proceeded to the mechanics' shop to check for records on the tractor. He noticed a notebook on a desk in the shop, on which someone had written "9-15-09 ST04 was tagged out for oil leak on hyl tank, mine manager went ahead an run it." [11] Tr. 233-35; Ex. G-18.

Trevor Walker, who worked the third shift on September 17, testified that he had used the tractor to rock dust the belt line. Before using it he had performed a pre-operational check, and had no recollection of finding any problems, such as accumulations or oil leaks. Tr. 300-01. When his shift ended, he began to wash the tractor, starting with the exterior and the operator's compartment. He noticed some oil in the cab, but not on other parts of the vehicle. Tr. 305. He did not finish washing it, because Kirkman needed the tractor, and said that he would finish washing it. Tr. 301-03. He allowed Kirkman to take the tractor, and left the miner site. About two hours after returning home, he got a call from Phillips, which surprised him. He was not fired, as Phillips had indicated to Morris, presumably because he had started to wash the equipment and released it to Walker on his promise to complete the washing. However, he received a disciplinary letter that he and a union representative signed under protest, and that was later taken out of his file. Tr. 306-08; Ex. G-22.

Kirkman worked the day shift as an outside supply man delivering supplies to the units. He testified that when he arrived Walker was in the process of washing the tractor. He had started on the exterior, and had worked on the operator's compartment. The floor of the compartment was wet with water, and had rock dust in it. He described the condition as "nasty." Tr. 311-12. Kirkman told Walker that he needed the tractor to take a take a trash trailer into the mine, and that he would finish washing it when he returned. Walker left the tractor in Kirkman's hands. Kirkman typically timed his first run into the mine to correspond with the shift change, and followed that traffic into the mine, thereby avoiding the out-bound traffic. He also deferred performing his pre-operational check until he returned to the surface. Tr. 314, 317. He had taken the tractor to the shop the day before because of an oil leak somewhere behind the firewall that was slowly dripping into the operator's compartment. A mechanic told him to put a tag on it, which he did. Tr. 320-23. When he took the tractor from Walker on September 17, he could not tell if it was still leaking because of the water and rock dust in the cab. He also related that there was a meeting of day-shift equipment operators, at which they were told to wash equipment and have leaks fixed. However, that was after the subject order had been entered. Tr. 316.

As Big Ridge concedes, the accumulations of oil and oil saturated coal fines and other material violated the standard.

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[11] Morris also spoke to a mechanic in the shop about the note. Tr. 234-36. On cross-examination, Big Ridge inquired about the identity of the miner, and the Secretary objected to disclosing it on grounds of the informant's privilege. Tr. 249-50. The Secretary's objection was sustained, and it was noted that the only additional information disclosed during the conversation, i.e., the name of the manager, would be disregarded in deciding the case. Tr. 250-51.

Significant and Substantial

The Commission recently reviewed and reaffirmed the familiar *Mathies*[12] framework for determining whether a violation is S&S. As explained in *Cumberland Coal Res.*, 33 FMSHRC ___, ___ (October 5, 2011):

> The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained:
>
> > In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
>
> *Id*. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984).
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> . . . .
> . . . .
>
> The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("*PBS*") (affirming an S&S violation for using an inaccurate mine map). The

[12] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984) .

> Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury." *Id*. at 1281. Importantly, we clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id*. The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id*. (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

The fact of the violation has been established. A measure of danger to safety, a discrete safety hazard, was contributed to by allowing combustible material to accumulate on the tractor, i.e., that the accumulations could be ignited exposing miners to heat, smoke and other products of combustion. The issues in the S&S analysis are whether the hazard contributed to was reasonably likely to result in a reasonably serious injury.

Morris testified that the oil was "all over" the piece of equipment, and that a filter on the exhaust system got "extremely hot" during operation. Tr. 230-31. In response to a question from the Secretary, he added that an injury from combustion could include burns. Tr. 232. He also described the presence of oil in the operator's compartment as being "all over the floor of the cab," and determined that the condition presented a slip and fall hazard that could result in abrasions or broken bones. Tr. 231-32. Morris made no mention of a combustion hazard in his field notes, wherein the only reference to potential injuries was the following: "It's reasonably likely that this condition would cause an event resulting in L/W [lost work] days injuries related to slipping & tripping in the operator's compartment." Ex. G-17 at 6. He explained that he could have issued a citation or order for a violation of section 75.1725(a), which requires that mobile equipment be maintained in a safe operating condition, but that he did not like to "double dip," and felt that his order effectively took the equipment out of service and forced correction of the leak problem. Tr. 240.

I place little weight on Morris' "combustion" theory, for a number of reasons. While he identified an "extremely hot" filter, and stated that combustion could cause burns, he failed to express an opinion that the violative condition, the accumulation of combustible materials, was reasonably likely to result in a burn or other serious injury as a result of combustion. He did not know the flash point of the oil or the oily accumulations. Nor did he know the temperature that the filter attained. Tr. 246. Moreover, the equipment had been operated for a sufficient period of time to have fully heated up, and no ignition or combustion had occurred. Morris was, no doubt, thinking about the combustibility of the accumulations when he issued the violation. However, he clearly did not base his S&S determination on the likelihood of a burn or other injury resulting from combustion. When he issued Order No. 8417566 the previous day, under very similar circumstances, his S&S determination was based upon potential combustion and he found that that violation was not S&S because of the absence of an ignition source. In addition,

he evaluated the potential injuries resulting from any combustion to be lost work days or restricted duty due to smoke inhalation and stated that if he had thought the combustion would have resulted in burns he would have rated the injuries as permanent. Tr. 255. As noted in the discussion of Order No. 8417566, occurrence of an injury due to smoke inhalation was little more than a theory.

The accumulations in the operator's compartment did not present a combustion hazard, as Morris evidently concluded. I accept the testimony of Kirkman and Walker that Walker had started to wash the equipment before Kirkman took it underground. Pictures, apparently taken by Phillips, showed conditions in the operator's compartment, which appeared to be very wet with water, rock dust, and yellow tinged deposits that Morris identified as hydraulic oil. Tr. 325-28; Ex. R-25 a-c. Judging from the appearance of the material, there was virtually no chance of an ignition in the operator's compartment, which is most likely why Morris made his gravity evaluation based on the slip and fall potential. An ignition of deposits in the engine compartment was possible, but did not pose any significant possibility of injury. As discussed with respect to Order No. 8417566, an ignition was unlikely, and any ignition most likely would have been promptly extinguished. Miners could easily have positioned themselves to avoid inhalation of smoke and other products of combustion.

I find that there is insufficient evidence upon which to base a finding that the hazard contributed to by this violation was reasonably likely to result in an injury producing event, or that a reasonably serious injury would have resulted.[13] I find that the violation was not S&S.

Unwarrantable failure

Prior notice - efforts to abate

The discussion of these factors with respect to Order No. 8417566 applies fully to this violation, except that Big Ridge did take some action in response to that order, prior to the issuance of the subject order. While Big Ridge's more significant remedial measures, installation of the power washer and establishment of the dripper program, were not implemented until later, a meeting was held with equipment operators on the night of September 16 at which they were instructed to wash accumulations off of mobile equipment and repair oil and other leaks. Walker had started to wash the tractor. However, Kirkman aborted that effort, and promptly drove the tractor underground because he deemed it critical to avoid outbound traffic associated with the shift change.

[13] While Morris' determination that the oil deposits in the operator's compartment presented a slip and fall hazard is plausible, that is not a hazard that was contributed to by Respondent's violation of the combustible accumulation standard. In apparent recognition of that fact, the Secretary's S&S argument was premised, almost exclusively, on the combustion hazard, the slip and fall hazard seemingly added as an afterthought. Sec'y. Br. at 22.

Big Ridge's communication of emphasis on the wash/repair program following issuance of the September 16 order demonstrates some responsiveness to the prior notice of extensive problems with accumulations of combustible materials on mobile equipment. However, that emphasis was not sufficient to prompt Walker to start washing the equipment early enough to complete the task prior to the end of his shift, or to prompt Kirkman to complete the task prior to taking the tractor underground. I find that the extensive prior notice, reinforced by issuance of the September 16 order, and Big Ridge's anemic efforts to address such violations, are aggravating factors in the unwarrantable failure analysis.

Extensiveness - Obviousness - Degree of Danger

For the same reasons discussed with respect to Order No. 8417566, I find that the violative condition was neither extensive, nor obvious, and that it did not pose a high degree of danger to miners. Morris was about to inspect the tractor, but agreed to defer the inspection while Kirkman took the trash trailer into the mine. The fact that Morris allowed the tractor to be used suggests that the condition was not obvious or extensive.

Big Ridge's knowledge of the violation - efforts to abate

Unlike with Order No. 8417566, there is convincing evidence that Big Ridge had actual or constructive knowledge of the violative condition. Walker had taken the tractor to the shop on September 15 because of excessive leaking of hydraulic oil behind the fire wall, dripping into the operator's compartment. A mechanic in the shop told him to "put a tag on it," i.e., take it out of service, which he did. The shop's records indicate that, two days prior to issuance of the order, and despite the fact that the leak, or leaks, had not been repaired, a mine manager directed that the tractor by placed back in service. It apparently remained in service up to the time the order was entered.

Big Ridge's agent placed the equipment back in service. He knew that the condition that prompted the tractor to be brought in for service had not been addressed, and undoubtedly knew the nature of the problem when he ordered it into service. He knew, or should have known, that leaking hydraulic oil would accumulate on the equipment and saturate other potentially combustible deposits. He also knew or should have known of the excessive recent history of violations for such accumulations and MSHA's warnings about such conditions. I find Big Ridge's knowledge of the violative condition, and its deliberate subordination of the abatement effort to other work, to be a strongly aggravating factor in the unwarrantability analysis.

Conclusion

Unlike Order No. 8417566, Big Ridge's knowledge of the violative condition and its failure to take steps to abate it easily tips the balance of the unwarrantability analysis in the Secretary's favor. I find that the violation was the result of Big Ridge's unwarrantable failure to comply with the standard.

The Appropriate Civil Penalties

Big Ridge is a large mine operator. Its history of violations for the 15-month period preceding issuance of the orders is reflected in a printout from MSHA's computerized database which was introduced into evidence. Ex. G-19. The report indicates that Big Ridge had 782 paid violations in the subject time period and that approximately 53 of those were S&S. None of the violations was identified as exhibiting an excessive history. Neither party urges Big Ridge's history of violations as a factor that should increase or decrease the amount of any civil penalty imposed for the subject violations. The parties stipulated that the proposed penalties would not affect Big Ridge's ability to continue in business. Big Ridge demonstrated good faith in promptly abating the violations.

Order No. 8418235 charged that Respondent failed to comply with its approved ventilation plan, that the violation was unlikely to result in a lost work days or restricted duty injury, that the violation was not S&S, that eight persons were affected, that the operator's negligence was high, and that the violation was the result of the operator's unwarrantable failure to comply with the mandatory standard. A civil penalty, in the amount of $4,099.00, was assessed for this violation. Big Ridge was found to have violated the standard. However, it was found that the violation presented no possibility of injury, that no miners were affected, and that Big Ridge's negligence was high, but that the violation was not the result of its unwarrantable failure. Order No. 8418235 will be amended to a citation issued pursuant to section 104(a) of the Act. Considering the reduction in the level of gravity and the vacating of the unwarrantable failure charge, as well as the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of $500.00.

Order No. 8417559 alleged that Big Ridge violated the combustible accumulations standard, that the violation was unlikely to result in a lost work days or restricted duty injury, that six persons were affected, that the operator's negligence was high, and that the violation was the result of the Big Ridge's unwarrantable failure to comply with the mandatory standard. A civil penalty, in the amount of $4,810.00, was assessed for this violation. Big Ridge was found to have violated the standard, and that the violation was unlikely to result in a lost work days or restricted duty injury to six persons. However, the violation was not the result of Big Ridge's unwarrantable failure or high negligence. Rather, its negligence was moderate. Order No. 8417559 will be amended to a citation issued pursuant to section 104(a) of the Act. Considering the vacating of the unwarrantable failure charge, the reduction in the level of negligence, as well as the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of $1,500.00.

Order No. 8417566 alleged that Big Ridge violated the combustible accumulations standard, that the violation was unlikely to result in a lost work days or restricted duty injury, that four persons were affected, that the operator's negligence was high, and that the violation was the result of the Big Ridge's unwarrantable failure to comply with the mandatory standard. A civil penalty, in the amount of $4,000.00, was assessed for this violation. Big Ridge was found to have violated the standard, and that the violation was unlikely to result in a lost work days or restricted duty injury to one person. In addition, the violation was not the result of Big

Ridge's unwarrantable failure, but its negligence was high. Order No. 8417566 will be amended to a citation issued pursuant to section 104(a) of the Act. Considering the vacating of the unwarrantable failure charge and the reduction in the number of persons affected, as well as the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of $3,000.00.

Order No. 8417568 alleged that Big Ridge violated the combustible accumulations standard, that the violation was reasonably likely to result in a lost work days or restricted duty injury, that the violation was S&S, that one person was affected, that the operator's negligence was high, and that the violation was the result of Big Ridge's unwarrantable failure to comply with the mandatory standard. A civil penalty, in the amount of $11,597.00 was assessed for this violation. Big Ridge was found to have violated the standard, and that the violation was the result of its high negligence and unwarrantable failure. However, it was found that the violation was unlikely to result in a lost work days or restricted duty injury to one person. Considering the reduction in the level of gravity, and the factors enumerated in section 110(i) of the Act, I impose a penalty in the amount of $9,000.00.

The settled violation

As evidenced by Joint Exhibit 2, the parties agreed to settle one of the violations at issue. It is proposed that Order No. 8417760 be modified to a citation issued pursuant to section 104(a) of the Act, at High Negligence, and that the proposed penalty be reduced from $4,000.00 to $3,200.00. I have considered the representations and evidence submitted and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly, the proposed settlement is approved and Respondent will be ordered to pay a penalty of $3,200.00 for the settled violation.

ORDER

Order No. 8417568 is **AFFIRMED as modified**. Order Nos. 8418235, 8417566 and 8417568 are **modified to citations issued pursuant to section 104(a) of the Act, and are AFFIRMED, as modified**.

It is **FURTHER ORDERED** that within 45 days Respondent pay civil penalties in the total amount of $17,200.00 ($14,000.00 for the contested violations and $3,200.00 for the settled violation).

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

Distribution (Certified Mail):

Tyler McLeod, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202-5710

Arthur Wolfson, Esq., Jackson Kelly PLLC, Three Gateway Center, Suite 1340, Pittsburgh, PA 15222

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
875 GREENTREE ROAD
7 PARKWAY CENTER, SUITE 290
PITTSBURGH, PA 15220
TELEPHONE: (412)920-7240
FAX:(412)928-8689

January 5, 2011

NEWMONT USA LIMITED,	:	CONTEST PROCEEDING
Contestant,	:	
	:	Docket No. WEST 2010-652-RM
v.	:	Order No. 6482848; 01/26/2010
	:	
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID: 26-02314
Respondent.	:	Mine: Midas Mine
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2010-1584-M
Petitioner,	:	A.C. No. 26-02314-224579
	:	
v.	:	
	:	
NEWMONT USA LIMITED,	:	
Respondent.	:	Mine: Midas Mine

DECISION

Appearances: Laura C. Bremer, Esq., Office of the Solicitor, U.S. Department of Labor, 90 7th Street, Suite 3-700, San Francisco, CA , for the Secretary of Labor

Laura E. Beverage, Esq., Jackson Kelly, PLLC, 1099 18th Street, Suite 2150, Denver, CO, for Respondent

STATEMENT OF THE CASE

This civil penalty proceeding was held pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802 et seq. (2000), (the "Act"). This matter concerns an alleged violation of the mandatory safety standard 30 C.F.R. § 57.8528. Order No. 6482848 was served on Newmont USA Limited ("Respondent" or "Newmont") on January 26, 2010. The alleged violation was found to be significant and substantial in nature, as well as an unwarrantable failure to comply with a mandatory safety standard. A hearing was held in Reno, Nevada on

September 26, 2011, and the parties participated fully therein. They later submitted post-hearing briefs.

STIPULATIONS AT HEARING

Prior to hearing, the parties stipulated to the following:

1. Newmont is engaged in mining operations in the United States and its mining operations affect interstate commerce.

2. Newmont is the owner/operator of the Midas Mine, MSHA ID No. 26-02314.

3. Newmont is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 USC § 801 *et seq*.

4. The Administrative Law Judge has jurisdiction in this matter.

5. Order No. 6482848 was properly served by a duly authorized representative of the Secretary upon an agent of Newmont on the dates and places therein, and may be admitted into evidence for the purpose of establishing its issuance.

6. The exhibits to be offered by Newmont and the Secretary are stipulated to be authentic with the exceptions of Respondent's exhibits 6, 9, 10, 14, 16 and 17.

7. The operator demonstrated good faith in abating the violation cited in Order No. 6482848.

8. The assessed penalty, if affirmed, will not impair Newmont's ability to remain in business.

9. Shon Guardipee, a former Mine Health and Safety inspector, wrote Order No. 6482848, which is the subject of this case. Mr. Guardipee lives in Idaho. The parties have agreed to present Mr. Guardipee's evidentiary deposition testimony in its entirety at the hearing, subject to objections made at the deposition.

10. Midas Mine is an underground gold mine operated by Newmont in Northern Nevada.

11. The alleged violation occurred at the North and South headings at the 5301 level of Spiral 1 at Midas Mine, which Midas refers to as 1-5301N and 1-5301S.

12. At the time of the MSHA inspection on January 26, 2010:
    a. The ventilation bag that directs air into the 1-5301 South heading at Midas Mine was tied off.

    b. Signs stating "Danger Heading Inspection Required" were posted at the 1-5301 North and 1-5301 South headings.

    c. Rope barriers were hanging across the 1-5301 North and 1-5301 South headings.

SUMMARY OF THE TESTIMONY

Shon Guardipee ("Guardipee") is a former inspector who worked for MSHA in its Elko, Nevada field office from December 2008 until April 2010. Depo Tr. 14, 18, 24.[1] Prior to working for MSHA, he had four to five years of experience and was involved in the mine rescue competitions. Depo Tr. 12, 13. After leaving MSHA, Guardipee went back to mining with a contractor at the Buckhorn Mine out of Republic Washington. Depo Tr. 18. He left MSHA because he was not particularly fond of the way business was conducted, and he was informed that his citation count was too low, and he would be fired if he did not increase it. Depo Tr. 92.

Guardipee began his regular inspection of the Midas Mine on January 26, 2010 at the top of Spiral 1 with an employee of Respondent named Ivan Castelanos and Jamie Wolicki, Miner Representative. Depo Tr. 29, 41. As he approached the 5301 heading, which was the access off of the main haulage, he checked the area for loose ground and observed that the sill fan at the 5301 level was off. Depo Tr. 35. This observation was based on the fact that the fans are very loud and there was a distinct lack of noise[2], as well as the fact that the ventilation bags were not pressurized. Depo Tr. 35, 36. As he moved in to inspect the 5301 South heading, he noticed that the ventilation bags were tied off, turned around and noticed that the others had not followed him into the headings. Depo Tr. 40,41. The fans remained off throughout the entire time of the inspection. Depo Tr. 42.

[1] "Depo Tr." refers to the transcript taken during Guardipee's evidentiary deposition. Because Guardipee now lives in Idaho, the parties stipulated to entering his deposition testimony in its entirety, subject to objections made during the deposition.

[2] Guardipee estimated that the fans run at about eighty decibels. Depo Tr. 93. This is about the decibel level of a lawn mower.

When Guardipee questioned the others in the inspection party, they informed him that the headings had been inactive for a week and a half. Depo Tr. 42; Ex. A, pg 6[3]. In his recollection, the ventilation bags[4] were tied off fairly close to the entrance of the heading. Depo Tr. 42. There were signs hanging by a rope or chain at the headings stating, "Danger, Heading Inspection Required." Depo Tr. 46, 51, 52; Ex. A, pg 6.

On January 26, 2010, from the information observed during his inspection, Guardipee wrote Order No. 6482848, citing a violation of 30 C.F.R. § 57.8528[5], stating:

> At the 1-5301 North and South headings the ventilation fan was off. The headings have been inactive for a week and a half. The headings were not barricaded or signed stating the nature of the hazard. The area is readily accessible. If a miner were to enter the heading fatal injuries could occur from lack of oxygen or high concentration of toxic gasses. Management engaged in aggravated conduct constituting more than ordinary negligence in that they were aware of the heading being inactive and did not take the appropriate actions to prevent inadvertent entry by miners. This violation is an unwarrantable failure to comply with a mandatory standard. Depo Tr. 55; Ex. 1.

Guardipee designated the Order as reasonably likely to result in a fatal injury. Ex. F, pg 1. He based this decision on the fact that the ventilation was off and, if the atmosphere was either toxic or lacking in oxygen, a miner entering the heading could sustain a fatal injury. Ex. F., pg 1 Finally, he designated the Order as high negligence on the part of the operator because Respondent had previously been cited and talked to about this behavior during inspections and the shifter, who was an agent of Respondent, was aware that the heading was inactive and unventilated and did nothing to correct it.[6] Depo Tr. 85, 86; Tr. 58; Ex. F, pg 1; Ex. GGG. This Order was terminated when Respondent barricaded the headings with a chain link fence bolted to the ribs and put up a sign that read "Danger, Inactive Heading" and underneath, Respondent included the words "inactive heading." Depo Tr. 59; Ex. F, pg 3.

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[3] At the hearing, the Secretary's exhibits were entered as letters and Respondent's exhibits were entered as numbers.

[4] Ventilation bags are nylon structures used to direct air flow to the working face in order to sweep the face and insure that proper ventilation is supplied to that area. Tr. 30. When one ventilation bag is tied off, it provides more air to the other ventilation bags. Tr. 32.

[5] Guardipee first cited the violation under 30 C.F.R. § 57.20011, but this was later modified to the section cited above on February 5, 2010. Depo Tr. 63; Ex. F, pg 2.

[6] See Citation No. 6482937 issued on October 14, 2009; Citation No. 6488534 issued on October 20, 2009; Citation No. 6482944 issued on October 22, 2009; Citation No. 6488537 issued on October 20, 2009; and Citation Nos. 6488539 and 6488541 issued on October 21, 2009. Ex. Q; Ex. W, pg 1; Ex. CC, pg 1; Ex. GG; Ex. JJ, pg 1; Ex. MM, pg 1.

Guardipee explained that it appeared that the air in Respondent's Midas Mine comes up from the bottom of the ramp, all the way to the top of the spiral and then moves into the main haulage. Depo Tr. 67, 68. During his inspection, Guardipee took gas readings at the 5351 North heading and did not find any noxious gas or lack of oxygen. Depo Tr. 69. However, he explained that the failure to have a chain link fence barricade to prevent access to an unventilated heading could result in miners accessing bad air. Depo Tr. 70, 71. He also acknowledged that it is common practice for a ventilation bag to be tied off to provide more air to the working face, but, in his experience, barricades in other mines were typically snow fences and rib-to-rib signage that expresses that there is no ventilation or the ventilation has been withdrawn. Depo Tr. 74, 75.

When asked about the ventilation of these particular headings, Guardipee could not specifically rule out that some natural ventilation would migrate to the headings. Depo Tr. 79, 80. He stated that the area cited was ninety degrees in two directions off of the spiral and referred to the area, instead, as a dead heading. Depo Tr. 79. However, he admitted that he was not an engineer qualified to determine how far the air coursing through the spiral would extend into those areas without any further ventilation. Depo Tr. 106.

When questioned as to his confidence in his penalty designations, Guardipee stated that as a trainee he had been somewhat involved in a similar situation at the Barrick Meikle Mine where, he believed, the sign was hanging from a rope and did not meet the definition of "barricaded," which would prevent the passage of persons, vehicles, or flying materials. Depo Tr. 83, 84. Here, one miner entered an unventilated area and lost consciousness. Depo Tr. 107. Another miner attempted to save him and either lost consciousness or became very disoriented. Depo Tr. 107, 108. It took a third man to turn on the ventilation fans to get the other two to safety. Depo Tr. 108.

Kevin Hirsch ("Hirsch") has been working for MSHA since 2002 and has been the Assistant District Manager for the Western District for the last two and a half years. Tr. 15,16.[7] His job duties include reviewing citations, orders and reports, specifically when these involve unwarrantable failures, knowing and willful violations, and special assessments to insure that they are properly cited and issued. Tr. 19, 61.

Hirsch testified that mines need to be ventilated to insure that oxygen remains at the appropriate levels above nineteen and a half percent. Tr. 27. Gases, such as carbon monoxide, dioxygen and sulfur dioxide, can occur naturally within a mine, but can also be produced through the usage of equipment or blasting. Tr. 27. To keep these gases at acceptable levels, mine operators must create and submit ventilation plans that must then be reviewed by MSHA prior to operation. Tr. 27,28, 116. Under cross-examination, Hirsch acknowledged the gas readings taken in the 1-5301 North and South headings indicated that there was no lack of

[7] Tr. refers to the transcript of the hearing in before the undersigned in Reno, NV on September 26, 2011.

oxygen or accumulation of gases. Tr. 63, 64, 65. He further stated that environmental methods of ventilation exist and, depending upon several factors, including whether the heading was near enough to the vent raise, air could have naturally been traveling to the heading. Tr. 66, 69, 70. He admitted that air would travel through the ventilation bags even if the auxiliary fan was off, but he had never, in his experience, seen a ventilation bag fully inflated without the fan running. Tr. 86. However, he also testified that he would not enter the heading without the auxiliary fan operating. Tr. 66.

Hirsch further testified that he had read Guardipee's notes and acknowledge that they indicated that the fan was off. Tr. 34. In his experience, he would not accept a sign stating "Danger, heading inspection required" as meeting the requirements of the regulation because a typical miner would walk in and inspect items that he could see. Tr. 34, 59. The problem is that the lack of oxygen or existence of bad gas is not something that can be seen, and it is not normal practice for Midas miners to use gas monitors in order to perform heading inspections. Tr. 34, 35, 59. He would want a sign that states "Unventilated area" to indicate that miners need gas monitors to determine whether there is adequate oxygen. Tr. 35. Under cross-examination, he did acknowledge that the Midas Mine does not naturally emit sulfur dioxide, dioxide, carbon monoxide or the lower explosive limits of any other gas. Tr. 114. However, he also testified that a violation of § 75.8528 can exist even when oxygen levels are adequate because the oxygen levels may not be adequate in the future. Tr. 119.

After the accident described by Guardipee at the Meikle Mine, a meeting was held at the Fire Science Academy outside of Elko, NV in June 2009. Tr. 40. The purpose of the meeting was to discuss ground control, but the focus turned to barricades because of the two miners that had been overcome by lack of oxygen. Tr. 41, 117. Representatives for MSHA read the definition of "barricade" and discussed the minimum requirements to meet the regulation to all operator representatives that were present. Tr. 43,44. Tim Burns and Mark Ward both attended this meeting for Respondent. Tr. 41. After this meeting, Respondent was cited several times for violations of 30 C.F.R. § 57.8528. Tr. 48, 59, 60; See FN 6.

Hirsch was also somewhat involved in the investigation of the incident at the Meikle Mine, although he was not present at the mine. Tr. 76. He acknowledged that there was some form of barricade in this mine and the miners went through it intentionally before being overcome by lack of oxygen. Tr. 76, 77. In his view, the barricade here would not have been adequate under the regulations because it did not extend from rib to rib. Tr. 77. The result of this accident is that although the miners had to go to the hospital, they did not end up missing any workdays due to the injuries they sustained. Tr. 80.

Jack Stull ("Stull") is a mine inspector in the Elko, Nevada field office with three years of experience. Tr. 126. Prior to his employment with MSHA, he worked at the Goldstrike Mine in northeast Nevada for approximately fourteen years. Tr. 126. He inspected the Midas Mine for the first time in October 2009 as part of a general inspection and was accompanied by Inspector Gerald Killion and Respondent's Health and Safety Specialist, Sandy McFarland ("McFarland"). Tr. 128, 139.

During the inspection on October 15, 2009, Stull observed and took pictures[8] to verify that the ventilation bags had been disconnected and were hanging from the back.[9] Tr. 131. Because the bags were not inflated, Stull concluded that the area was not ventilated. Tr. 143. Based on this observation, he issued a citation to Respondent under 30 C.F.R. § 57.8528. Tr. 131. During his testimony, Stull stated that, although there was a berm in place from rib to rib, the citation was issued because Respondent had no sign posted against entry. Tr. 135, 136. The gas reading at the entrance of the heading showed adequate levels of oxygen, but Stull would not traverse further into the heading because he "did not want to put himself in danger." Tr. 135. Later, Respondent was issued a citation under the same code section because, although it had posted a sign against entry, it had only placed a chain across the heading, which Stull stated did not meet the definition of "barricade" as contemplated by the statute.[10] Tr. 143, 144, 146. He then explained what MSHA would accept as a barricade. Tr. 146.

When Stull issued Citation No. 6488539 on October 20, 2010, he observed that the ventilation bag was tied off and damaged, there was a sign stating "Danger, heading inspection required" and only a small piece of rope was used to barricade the heading. Tr. 148, 149. On cross examination, Stull recognized that he does not know the Midas Mine's procedure for conducting a heading inspection. Tr. 170. Because Respondent was already on the D series[11], Stull decided then to speak directly to his supervisor, Jim Fitch ("Fitch"), as well as the Safety Specialist for the Western District, Rod Gust, to ensure that the information that he was giving to Respondent was correct. Tr. 151 - 153. They confirmed that Stull was correct and Fitch met Stull at the Midas Mine the next day to discuss the appropriate measures to be taken, given the definitions under 30 C.F.R. § 57.8528. Tr. 154, 155. Upon completing the inspection, Stull found one other violation of the standard. Tr. 159.

On cross-examination, Stull acknowledged that, while snow fencing would impede a person attempting to enter a heading, it would not stop him if he intended to do so. Tr. 165. He testified that a rope would possibly impede a person as well. Tr. 165. In training, he was not given the definition of "unventilated;" rather, he was trained to look for the conditions that would lead to an area being unventilated - fans turned off, ventilation bags down or damaged,

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[8] The quality of the pictures was poor, at best. I give them little probative value, therefore, placing most of the probative weight on Stull's testimony.

[9] The "back" refers to the roof of the top. Tr. 131.

[10] At this point, Stull testifies that McFarland became agitated and began to swear at him saying that he was not going to put a barrier up in all the headings that are going to be mined soon. Tr. 145, 146; Ex. K, pg 15 (confirms professionalism discussion). Stull replied that he would cite each heading that was not properly barricaded. Tr. 146.

[11] Once an operator is placed on the D series, it must survive an entire inspection without any citations or orders written under 104(d) to be released from it. Tr. 152.

etc. Tr. 166. If the auxiliary fan was off and/or the ventilation bags were tied off, the area was unventilated in his opinion. Tr. 166.

When asked about the ventilation plan in place at the Midas Mine, Stull stated that, although he was never involved in making such a plan, he had a reasonable understanding of it. Tr. 181, 182. He testified that Respondent uses a main fan that pulls air from the surface to the underground and boosters or auxiliary fans are used to move that air into the headings and laterals. Tr. 182. The reused air then goes out the ventilation or drift. Tr. 182. Although a smoke tube can be used to determine whether there is air circulation, Stull did not use this equipment during his inspection and, therefore, could not determine the quantity of air that was moving through the mine. Tr. 183, 184.

Sid Tolbert ("Tolbert") has been the Mine Supervisor at the Midas Mine for approximately three years and was the supervisor at the time that the Citation was issued in January 2010. Tr. 209. In his professional capacity, he is responsible for the health and safety of all personnel, including those underground, and was actually a miner at the Midas Mine prior to 2004, working in mine development. Tr. 210.

Tolbert testified that the citation as issue here was written in a development area. Tr. 213. During the development process, miners drill holes in the area to be excavated with a rock drill, load the holes with explosives and blast the rock into a muck pile. Tr. 213, 214. The rock is then removed by a front end loader, ground supports consisting of friction bolts and wire are added and then miners finish mucking out the area. Tr. 214.

Tolbert explained that a vent raise is used to bring fresh air into the active sill headings for the purposes of ventilation. Tr. 216. An auxiliary fan was also permanently located in the 1-5301 headings in the bulkhead, which is structure made out of concrete and wire mesh to seal off the area and make it airtight. Tr. 217. It is turned on by pushing a button in the electrical power box. Tr. 217. If the box malfunctions, the electricians are called down to fix it. Tr. 217, 218.

As for the geology of the mine, Tolbert testified that there are three basic types of rock within the mine. Tr. 218. "Tuffs" are basically waste development that are formed by volcanic eruption when the ash shoots into the air, comes down and layers upon itself. Tr. 218. "Mafic flows" are basically lava flows that slow into cracks that run horizontally. Tr. 219. Finally, "intrusive flows" occur where the rock cracked open and allowed either lava or mineralized veins to form. Tr. 219. According to Tolbert, the mine does not have the rock strata to cause an oxygen deficiency and these geological formations do not emit sulphur dioxide, nitrogen dioxide, carbon monoxide or the lower explosive limit of any other gas.[12] Tr. 219. However, he

[12] These observations are somewhat less persuasive because Tolbert has no formal geological training. Tr. 256. It follows, then, that his knowledge is based only on experience at the mine.

does acknowledge that manmade contaminants exist in the mine, such as carbon monoxide from the blasting and diesel engines as well as nitrogen dioxide from the blasting. Tr. 255.

Tolbert further testified to the specifics of the ventilation system at the Midas Mine by stating that the mine uses both primary and auxiliary ventilation. Tr. 220, 221. The primary ventilation had two intakes at the time and the portal was for negative flow. Tr. 221. The deep raise vent consisted of two 350 horsepower fans sitting on the surface pushing approximately half a million cubic feet of air per minute ("CFM") down into the bottom of the mine and dumping it out at the Five Haulage. Tr. 221, 222; Ex. B. As it is pushed down, the air is sucked up a second vent raise by the auxiliary fan and the main North Vent Raise fan, splitting the air that was originally pushed down. Tr. 223. Of this split air, approximately 100,000 CFMs comes up the Three Spiral and approximate 151,000 CFMs go up Four Spiral. Tr. 223; Ex B. This air is then dumped back into the Five Haulage, where it works its way up the Five Spiral, comes down the 5450 Haulage and is exhausted back into the atmosphere by the North Vent Raise. Tr. 223, 224; Ex. B. The South Vent Raise exhausts approximately 331,000 CFM and about 110,000 of this came from Spiral one at issue here, which is primarily ventilated through the portal ventilation. Tr. 225; Ex B.

Tolbert testified that the secondary ventilation consisted of a 125 horsepower fan located at the bottom the ventilation raise. Tr. 226; Ex B. It is bulkheaded off and sealed so that it cannot recirculate as it pushes about 100,000 CFMs up the raise. Tr. 226. Several auxiliary fans draw the air out of the raise and direct into the development drifts in the sill headings through the use of ventilation bags. Tr. 226, 227. In his opinion, there would be ventilation whether the auxiliary fans were running or not because pressurization of the vent raise will push air into the openings.[13] Tr. 226, 227, 236, 241. He, however, acknowledged that, when miners are working in the drifts, the auxiliary fans are typically on. Tr. 227. This is insured through the five-point heading inspection that is required before any work can commence in an area. Tr. 227; Ex 7. New miners to the Midas Mine are trained during a four-week class to understand what the lay of the mine, the five-point inspection, and what they are looking for during this inspection. Tr. 228.

During the five-point inspection, Tolbert explained that a miner[14] would start right off the spiral and would look at the intersection to check for loose ground, damaged wire, damaged ground support or other hazards. Tr. 229. As he got closer to the intersection of the sill headings, he would start looking at ventilation, checking the utilities, such as ventilation bags,

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[13] Tolbert testified that a test was conducted on the ventilation system during a power outage. Tr. 242. Ventilation engineers were instructed to check all of the main haulages, exhausts and intakes within the mine for air flow, both quality and quantity. Tr. 242. According to Tolbert, there were no problems with the air quality. Tr. 242.

[14] Although Tolbert states that an "experienced miner" must conduct the heading inspection, there is no explanation of what experience is required. Tr. 257.

and making sure that the fan is on and operable. Tr. 229-231. If the fan was off on arrival, he would start it before he proceeded any further than the starter box. Tr. 230. Once any hazards were corrected, he would remove the barricade and take down the sign. Tr. 230. Prior to October 2009, the Midas Mine had always used a rope that stretched from rib to rib and metal sign that stated, "Danger, heading inspection required." Tr. 231. Miners were taught that this meant that a heading inspection was to be done before work commenced and any hazards or deficiencies were to be corrected. Tr. 231, 232. If any of these could not be corrected, the miners were to call their shift foreman for help. Tr. 232. There is no procedure at the Midas Mine for when headings must be tested for has levels. Tr. 257. Although it is not common, miners have been disciplines or fired for failing to perform adequate heading inspections. Tr. 233.

After the inspections in 2009, Mark Ward ("Ward"), mine manager for the Midas Mine, sent out a memorandum stating that Tolbert needed to give direction to the supervisors as to how to barricade and what types of headings needed to be barricaded. Tr. 237, 238, 280. Tolbert admitted that after the inspection, he was not clear on what needed to be barricaded because it had not been an issue prior to this inspection. Tr. 238. However, after receiving the citations, he suggested to Respondent's personnel that snow fence needed to be attached at all four corners, top and bottom. Tr. 252. Tolbert later developed a standard operating procedure, but it was not presented to the miners and, later, Tolbert testified that Respondent was actually complemented on its barricading procedures by another miner; although, Tolbert was not present to hear this complement. Tr. 239, 240, 248. During cross examination, Tolbert agreed that snow fencing and chain link fencing were used in some instances in the mine and that, at least for the snow fence, the installation is done through the use of a handheld drill and takes less than thirty minutes to finish. Tr. 249, 251.

Under cross examination, Tolbert explained that a crew consisted of twenty-five to thirty men. Tr. 245. One foreman per crew carries an air quality monitor, but the miners on the crew do not carry them. Tr. 245. Further, the air quality monitors are kept on the surface. Tr. 245. So, should a miner get underground and realize that he needs a monitor, he must either walk back up to the surface or call to have someone bring it down to him. Tr. 245, 246. He also testified that, although miners are supposed to verify that air from the vent bag is sweeping the face, no smoke tubes or anemometers are used to ensure that this is the case. Tr. 255. He stated that although air would travel to a heading without the use of an auxiliary fan and with the ventilation bag tied off, the air would not sweep the face. Tr. 271. Enough air would migrate through the heading to dilute gases though. Tr. 273.

While the members of any crew who work for the mine are required to take the four-week training session, Tolbert acknowledged that subcontractors do not have to take this training session. Tr. 247. He stated that he is further aware of instances in the last three years where miners have failed to complete heading inspections and maintain ventilation bags. Tr. 247.

As previously stated, Mark Ward is the Mine Manager for Respondent's Midas Mine and has held this position for a little over four years. Tr. 280. Prior to this, he was the mine manager

at Respondent's Carlin operations for about ten years. Tr. 281. In total, he has worked in the mining industry for over twenty-five years and graduated from South Dakota School of Mines and Technology where received his Bachelor of Science degree in Mining Engineering. Tr. 281, 282. However, except for three months in 1981, all of his experience prior to the Midas Mine had been in surface mines. Tr. 302. His primary duties at the Midas Mine are to maintain safe and cost effective production. Tr. 282.

Ward is further involved in forecasting, which is the updating of the mining and development production plan and determining all the operating and capital costs associated with operations for the life of the mine. Tr. 282, 283. This is then used as a business model for the operator and leads to a sequence of development and production. Tr. 283. However, mining is a fairly dynamic environment, so things can change from quarter to quarter. Tr. 283. The map he creates is color-coded to signify periods of time when activity is going to take place. Tr. 283, 284; Ex 17.

Ward testified that the process of developing an area is a very complicated process that takes a long time from drilling into development and ultimately into production based upon economics; and it requires several stages. Tr. 286. Initially, Respondent uses drill holes to drill a two-inch core through the vein to determine where it is located, its thickness and to obtain assay results on the gold and silver content. Tr. 287, 288. From these results, geologists build a geological wire frame model that shows in space based upon the surveys and intercept where the intercept is located. Tr. 288. The model is then turned over to the modelers, who apply geostatistical analysis, break the model down into twenty-five foot long by twenty-five foot wide blocks that are the thickness of the vein intercept and use the assay results to assign a metal value to the block. Tr. 288. Depending upon where the operator is at in the process, development could take several weeks or up to a year. Tr. 288.

During the time of development, people are required to access the development heading, like heading 5301 at issue, in order to collect information, such as channel samples for metal analysis. Tr. 288, 289. This, in turn, can drastically effect the development plan as more knowledge of the value of the core is determined, such as in 5301 which was developed much different than what was conceptualized the year prior to its development. Tr. 303, 304. In his opinion, Ward would label this area as an active area that is not a working area because there may not be someone assigned to that area that day or for the week. Tr. 289. However, he explained that Respondent would be aware that someone needed to enter the area sometime before it had to be done. Tr. 289.

Ward mirrored the testimony of Tolbert that a five-point safety inspection must be conducted prior to work being conducted in the area and that there are rigorous training requirements for new miners. Tr. 290. He further stated shifters visit working places once at shift at a minimum and they normally carry gas detection devices with them. Tr. 291. However, he further testified that this mines does not naturally produce gas so oxygen deficiency is not a problem in this mine and he relies on the mineralogy of the rock and history of the mine to make these statements. Tr. 291.

Ward testified that he attended the meeting at the Fire Science Academy in Elko, NV in June 2009. Tr. 292. He recalled that a PowerPoint presentation was shown concerning the industry trends on injuries, but does not recall that any other topics were discussed at length. Tr. 292, 293. He further cannot recall ever having seen any policy guidance that is written with respect to the application of 30 C.F.R. § 57.8528 and, in his opinion, unventilated means that there is a lack of oxygen. Tr. 293. He does not agree that the fact that an auxiliary fan was off means that the area is unventilated because the fan can easily be turned on and, in any event, air migrates into the headings even when the fan is not turned on. Tr. 293, 294. In the event that a gas producing event is occurring, such as blasting, the area is barricaded for a minimum of thirty minutes and the area is blocked by mine employees so that no one can enter. Tr. 294.

Ward recognized that rope barricades and signage stating "Danger, heading inspection required" was not in compliance around October 2009, when the mine was issued a number of citations. Tr. 294, 295. In response to this, Ward drafted a policy document relating to active versus short term inactive versus long term inactive headings to give the miners some guidance in what type of barricade and signage would be required in different situation to avoid future citations. Tr. 295, 296. Chain link fence was to be used to barricade long term inactive headings, snow fence was to be used on short term active headings and rope barriers were to be used on active headings, which included headings that were scheduled for production or development in the following four weeks where the ventilation bags had been tied off. Tr. 306-308. To this end, he stated that it is not practical to install snow fencing every time a heading is unproductive for a period of time because it could be inactive for a very short period of time, such as a week, and there is some flexibility in the mining plan. Tr. 297.

Ward testified that all of the previous citations issued to Respondent under the code section at issue here had been settled. Tr. 312. These citations had ranged in penalty from $128.00 to $285.00. Tr. 313. The assessed penalty for Citation No. 6482848 is $35,000.00. Tr. 313. Ward stated that it was an economic decision to contest this citation. Tr. 313.

Ivan Castellanos ("Castellanos") is General Foreman at Respondent's Midas Mine and has been with Respondent for thirteen years. Tr. 316. Prior to this, he worked at Turquoise Ridge and the Miekle Mine belonging to Barrick Goldstrike. Tr. 316. Before his position as General Foreman, Castellanos was a lead man or active shifter. Tr. 316. His responsibilities include enforcing all policies in order to ensure that everyone gets home safely at the end of the day. Tr. 316.

Castellanos was present during the inspection on January 26, 2010. Tr. 319. He testified that when he arrived at the 5301 elevation, the auxiliary fan was turned on, but he turned it off when he got to the crosscut because the inspector asked him what level they were on and he had to turn it off in order to talk to him. Tr. 319, 320. He stated that no one was working at the time of the inspection and he conducted the heading inspection that was required. Tr. 321. Both headings were roped of and posted with the exact same signage. Tr. 327. Castellanos testified that both he and Guardipee walked all the way to the face of the north heading and Guardipee's gas meter did not alert them to any problems. Tr. 322. He further corroborated Guardipee's

testimony that he did not follow him into the south heading because there was a hazard and he held his men back. Tr. 322. He did not witness Guardipee taking any air quality samples and his gas meter did not alert them to any problems in the heading. Tr. 322, 323. Although he did not follow Guardipee into the south heading, he was not concerned that the air quality was bad in the heading. Tr. 328. He stated that he simply didn't want to go against company policy. Tr. 328.

In the course of his employment, Castellanos has only had his gas monitor go off when he was following a truck too closely and the carbon monoxide alarm went off. Tr. 325. He has never had it go off without the presence of running equipment, however. Tr. 325. In his position as foreman, he visits the crews during their work shifts at least once a day. Tr. 325, 326. If a fan happens to go down, he typically gets in touch with the electricians, tags the fan out and pulls the miners out of the heading until the fan is replaced. Tr. 326.

The final witness, Lennon Van Kirk ("Van Kirk") is an underground miner, tech five and lead man at the Midas Mine and has been with Respondent for approximately six years. Tr. 329. One of his responsibilities is to conduct five-point inspections prior to working in a heading. Tr. 329, 330. He testified that ground control and ventilation are the two most important parts of the inspection. Tr. 330. During the ventilation inspection, he inspects the condition of the vent tubing, fan controls and ventilation bags. Tr. 330.

He testified that the auxiliary fan could be turned off for a number of reasons. Tr. 330. One reason would be during a blast, which create so much pressure coming out that it would blow the ventilation bag to the ground. Tr. 331. Another reason for turning the fan off is to talk on the phone. Tr. 331. The fans that are so loud that they must be turned off in order to have a conversation in the crosscut. Tr. 331. Finally, he stated that the fans would be turned off in order to repair or install ventilation bags. Tr. 331. He stated that it would not be practical to erect a barricade every time a fan was turned off because it would be very time-consuming and, in his opinion, is not necessary. Tr. 331.

Van Kirk acknowledged that Respondent does use signs that say "unventilated area." Tr. 331. He testified that these signs are typically used when the ventilation infrastructure, such as the control box or fan, has been removed and it is an inactive area, but this would not be used in a scenario where the fan is simply turned off. Tr. 331, 332. He confirmed that an auxiliary fan and ventilation bag would be located in every active heading, but stated that they would not always be present in heading that were short term inactive. Tr. 333. He testified that they may be absent for planning purposes or used in a different area of the mine if needed, but a snow fence would be erected with an "unventilated area" sign posted. Tr. 334.

LAW AND REGULATIONS

30 C.F.R. § 57.8528 states, "Unventilated areas shall be sealed, or barricaded and posted against entry."

30 C.F.R. § 57.2 clarifies the meaning of "barricaded" as, "obstructed to prevent the passage of persons, vehicles or flying materials."

In interpreting the meaning of a statute, the Commission has recognized that "[w]hen the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails and it cannot be expanded beyond its plain meaning." *Western Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (Sept. 1996). It is a cardinal principle of statutory and regulatory interpretation that words that are not technical in nature "'are to be given their usual, natural, plain, ordinary, and commonly understood meaning.'" *Western Fuels*, 11 FMSHRC at 283 (citing *Old Colony R.R. Co. v. Commissioner of Internal Revenue*, 284 U.S. 552, 560 (1932)). It is only when the plain meaning is doubtful that the issue of deference to the Secretary's interpretation arises. *See Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (deference is considered "*only* when the plain meaning of the rule itself is doubtful or ambiguous") (emphasis in original); *Azno Nobel Salt, Inc.*, 21 FMSHRC 846, 852 (Aug. 1999).

A violation is significant and substantial ("S&S") "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984)(footnote omitted); see also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1998)(approving the *Mathies* criteria). The Commission has further found that "an inspector's judgment is an important elements in an S&S determination." *Mathies*, 6 FMSHRC at 5 (citing *Nat'l Gypsum*, 3 FMSHRC at 825-826). An evaluation of the reasonable likelihood of injury should be made assuming continued mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985)(quoting *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)).

In *Emery Mining*, the Commission determined that an unwarrantable failure is "aggravated conduct constituting more than ordinary negligence." 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such as conduct as "reckless disregad," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. At 2003-2004; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal*, *Inc.,* 52 F.3d at 136 (approving the Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses

a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), rev'd on other grounds, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1998). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC at 353.

ISSUES

Did Respondent violate 30 C.F.R. § 57.8528 so as to justify the issuance of Order No. 6482484 pursuant to 30 U.S.C. § 104(d)(2) of the Act?

CONTENTIONS OF THE PARTIES

The Secretary contends that Respondent's mere use of a rope with a sign stating "Danger, heading inspection required" in an inactive heading is a violation of 30 C.F.R. § 57.8528. This is based on the Secretary's belief that these actions neither meet the definition of "barricade" found in 30 C.F.R. § 57.2 nor meet the requirements of a sign posted against entry as contemplated by the regulation. She further argues that this violation is significant and substantial because it could cause fatal accidents if miners were to be overcome by a lack of oxygen, especially in light of the accident that occurred in the Miekle Mine in 2009. Finally, she asserts that Respondent's actions constitute an unwarrantable failure to comply with a mandatory standard because it had been cited several times in the past, but refused to change its behavior to comply with the regulation.

Respondent first argues that 30 C.F.R. § 57.8528 is inapplicable because the headings at issue were not "unventilated areas." It asserts that this is a non-gassy mine and, further, no work activity was taking place to create toxic gases. It further argues that the geology of the mine allows for the natural migration of air due to the main shaft fan running, causing air to sweep the faces of the headings. Second, it contends that the auxiliary fans and vent bags were in place and all that had to be done was to untie the vent bags in the South heading and turn on the fan if work was to be done in the cited area. Third, it argues that the rope barricade was sufficient because even a snow or chain link fence could not stop a miner from entering the area if he or she wanted to enter. Finally, it argues that the Secretary's interpretation of the standard is unworkable, less safe, confusing and arbitrary and that it is inconsistent with MSHA's regulatory history and scheme as a whole.

DISCUSSION AND CONCLUSIONS

1. S&S Designation

The undersigned concludes that this violation is S&S, but not an unwarrantable failure to comply with a mandatory safety standard. In first determining that the violation is S&S, the four criteria under *Mathies* must be examined. The first criterion of Mathies, a violation of a safety standard, is evident. 30 C.F.R. § 57.8528 explains that an unventilated area must be sealed or barricaded and posted against entry. Because the auxiliary fan was turned off and the ventilation bags were tied off, the undersigned concludes that the area was unventilated. Therefore, it should have been either sealed off or barricaded and posted against entry.

The plain and unambiguous definition found in 30 C.F.R. § 57.2 states that a "barricade" must be sufficient to prevent vehicles, persons or flying materials. A single rope strung from rib-to-rib is incapable of preventing any of the items listed in the definition from entering the heading. Further, the sign made no mention that entry was prohibited or that the area was unventilated. Instead, it stated only that a heading inspection was required. Since any "experienced" miner can perform the heading inspection and air quality tests are not mandatory, this signage is not sufficient. Tr. 257. Under this analysis, the violation of a safety standard is clear.

Under the second criterion, a discrete safety hazard must be contributed to by the violation. By employing this insufficient method of "barricade" and signage, the employer is contributing to the chance that a miner will underestimate the level of danger, access the area and be overcome by noxious air or a lack of oxygen.

The third criterion under *Mathies* requires that the hazard contributed to must be reasonably like to result in injury. The undersigned finds that the following facts contribute to the hazard: the inferior barricade of the heading, the signage stating only that a heading inspection was required, the auxiliary fan in the "off" position and the ventilation bags tied up to redirect airflow to working areas of the mine. The undersigned finds that this confluence of factors contributed to the hazard of miner being overcome by noxious air or a lack of oxygen and is reasonably likely to result in an injury. Although there is agreement that there are legitimate reasons for the ventilation bags being tied off, the Act demands that these areas be barricaded and posted against entry to avoid the possibility of a miner walking, whether intentionally or unintentionally, into an unventilated heading.

In meeting the fourth criterion of the occurring injury being of a reasonably serious nature, it is clear that if a miner was receiving insufficient level of oxygen to the brain, serious injuries would reasonably likely occur. Commission precedent regards the dangers of low levels of oxygen as "well-known" and obvious. See *Kelly Creek Resources, Inc.*, 19 FMSHRC 457, 462 (Mar. 1997).

In arguing that the injury is not reasonably likely to occur, Respondent states that 30 C.F.R. § 57.8528 has been misapplied to its Midas Mine because, first, the mine is non-gassy and, second, the areas are ventilated whether the auxiliary fan is on or not due to the natural migration of air through the mine. The undersigned does recognize that the fact that a mine is non-gassy is a mitigating factor in determining whether a serious injury is reasonably likely to

occur. The mine itself may not emit gases; however, Respondent runs diesel and other equipment in the mine, which do emit combustible gases that can build up over time in unventilated areas.

To illustrate its second argument, Respondent points to the gas readings taken by Guardipee during his inspection of the Midas Mine. Although Guardipee's readings show sufficient oxygen and no measurable combustible gases, several facts and opinions weaken this argument. Depo. Tr. 69; Ex. A, pg 6. First, the Commission has acknowledged that the conditions in a mine can change unexpectedly. See *Cumberland Coal Resources, LP*, 28 FMSHRC 545, 553 (Aug. 2006) Second, Guardipee explained that air moving through the spiral would have to enter the heading and then move ninety degrees in either direction to fully ventilate the heading and this is combined with the testimony of Tolbert who acknowledged that without the fans on, air would not sweep the face as required. Depo. Tr. 79; Tr. 271. Finally, in the event of an auxiliary fan going down in the middle of the shift, Castellanos testified that it is company policy to contact the electricians and pull the miners out of the heading until the problem is fixed. Tr. 326. This procedure tends to be drastic for areas that are ventilated anyway. While Respondent's action in pulling the miners is certainly applauded, it does tend to weaken any argument that the area is, in fact, ventilated, and Respondent has offered no explanation as to why it pulls its employees out if those areas remain ventilated. As a further note, although Tolbert suggested that sufficient air could be circulated through tied off ventilation bags, the undersigned finds this explanation to be beyond reason.

Moreover, Guardipee's entrance into the heading is an exact situation where more descriptive signage is necessary. Guardipee was unaware that the area was not ventilated and easily bypassed the rope to enter the heading. Although Respondent requires its employees to undergo a rigorous training course on heading inspections and company policy regarding these inspections, subcontractors do not receive this luxury and may be inclined to do the same thing that Guardipee did should there be some need to cross the rope. Tr. 247.

Respondent also asserts that roping off the area is as sufficient as snow fencing or chain link fencing because none would stop somebody with the intent of crossing it from doing so. This argument falls flat and completely disregards the plain language and intent of the regulation. While it is true that any of these barricades would be unlikely to stop the miner absolutely determined to reach the other side of it, the simple rope is much less likely to stop anything from breaching it. Anything dropped could roll, bounce, etc., under or over it with little to no chance of it being stopped. A miner ducking under or stepping over the rope to retrieve the object would then be in a hazardous position. It is understood that company policy is not to enter the area, but it seems incomprehensible that Respondent could contend that no miner would violate this policy to quickly retrieve a lost item. Not only would a snow fence or chain link fence be more likely to stop the object, it would also give the miner pause before he heedlessly entered the unventilated area. For these reasons, the undersigned finds that a rope does not qualify as a "barricade" as contemplated by 30 C.F.R. § 57.2. In consideration of the foregoing, the undersigned finds that a violation of 30 C.F.R. § 57.8528 does exist and it was correctly designated as S&S.

Respondent finally asserts that the Secretary's definition of 30 C.F.R. § 57.8528 is unworkable, less safe, confusing and arbitrary. This is unpersuasive in that a very specific definition is given for the word "barricade." Respondent cannot realistically argue that a single rope or chain is sufficient to stop people, vehicles or flying objects from entering the heading. It is further unclear how erecting a fence to prevent entrance is less safe than stringing a rope or chain and Respondent offers no explanation of this. Nor does it explain why is asserts that the Secretary's plain language interpretation of the standard is arbitrary. In terms of the unworkable nature of erecting a fence, it has been recognized that some efficiency may have to be sacrificed in order to protect the safety of those working in the mine. See *Plateau Resources Limited*, 5 FMSHRC 605, 607 (1983)(ALJ). Moreover, a time intrusion of less than forty minutes does not seem like such a substantial burden as to outweigh the life or safety of a miner.

The undersigned does recognize that there is no further definition of the phrase "posted against entry" found in the regulatory text and this could lead to some confusion, but the plain meaning of the words lead to the conclusion that the sign should indicate that a miner should not enter the area. Although Respondent's full time employees are trained to understand what is meant by "Danger, Heading Inspection Required," subcontractors and inspectors do not have the luxury of this training. This, it seems, would lead to more confusion than blatantly stating "Do Not Enter." The undersigned finds that the Secretary's interpretation of the plain language of the statute is reasonable.

2. Unwarrantable Failure

In determining whether the unwarrantable failure designation, the undersigned must consider whether Respondent's conduct was aggravated and consisting of more than ordinary negligence. Order No. 6482848 was the seventh violation of 30 C.F.R. § 57.8528 issued to Respondent since October 2009. Guardipee stated in his notes that he designated the Order as high negligence on the part of Respondent because, not only had the it been previously cited under the same regulation before, the accepted methods of barricading an unventilated heading had also previously been discussed with it. Depo. Tr. 85; Ex. F, pg. 1. As of the date of this hearing, Respondent had not changed its methods of barricading. Tr. 333.

Respondent witness Tolbert testified that in light of the previous citations, it developed a policy for barricading in order to give the miners some guidance on the issue. Tr. 237, 238, 280. In its section entitled "active" headings, it defines an active heading as including those that are scheduled to be in production or development within four weeks. Ex. 17. To prevent entry, a rope with heading inspection sign attached to it are hung from the headings. Respondent testified that to actually barricade each of these headings would be inefficient, time-consuming and unnecessary. Tr. 334. However, witnesses for Respondent recognized that the erection of a barricade takes approximately thirty minutes and only a few minutes to take down. Tr. 249, 251. As noted above, efficiency cannot be weighed against the health and safety of a miner. See *Plateau Resources Limited*, 5 FMSHRC 605, 607 (1983)(ALJ). And, as the accident at the Meikle Mine illustrates, the barricading of unventilated headings is certainly not unnecessary.

Respondent also argues that the auxiliary fans and vent bags were in place and all that had to be done was to untie the vent bags in the South heading and turn on the fan if work was to be done in the cited area, the undersigned finds this unpersuasive. While pushing a button to turn on the auxiliary fan is simple enough, a miner must then get equipment or a ladder in order to untie the ventilation bag. This amount of time spent in an unventilated heading could result in an injury to the miner. Because of this, this argument cannot be accepted.

The undersigned is persuaded, however, by Respondent's argument that it was not on notice of MSHA's interpretation of the regulations. In it's Post-Hearing Reply Brief, Respondent states that the Secretary argues that at the meeting in Elko, NV, Hirsch gave "operators specific guidance about what the Western District would accept as a barricade." From this, it argues not that it did not understand what a barricade was, but, rather, when a barricade must be used. Based on its understanding of the guidance given, Respondent argues that it developed policies in order in an attempt to reduce the amount of citations issued under 30 C.F.R. § 57.8528. Although Respondent had been previously cited under the standard, the undersigned finds that Respondent possessed a good faith belief that its policy of roping off headings that were to be worked in the near future complied with the regulations. Although the undersigned stresses that Respondent is now on notice, he does not find its conduct to be so aggravated and of such negligence to justify the Secretary's finding of an unwarrantable failure.

As a final assessment, the undersigned finds the testimony of Castellanos claiming that the auxiliary fan was in the on position, but he turned it off in order to be able to talk to Guardipee to be incredible. Although Respondent argues in its Post-Hearing Brief that this fact was corroborated by Guardipee, there is no evidence of that. Guardipee testified that the auxiliary fan was off when they approached the heading. Further, and telling, Castellanos' testimony was the first time that this issue was ever raised by Respondent. It seems beyond comprehension that Respondent would be cited for actions taken in an attempt to promote the efficiency of the inspection and not raise that issue until the second to last witness at hearing.

3. Penalty Assessment

At hearing, Respondent witness Ward testified that all prior citations written under 30 C.F.R. § 57.8528 were assessed between $128.00 and $285.00. Tr. 313. However, the penalty assessment for Order No. 6482848 is $35,000.00. In determining the appropriateness of the penalty assessed for this Order, I am bound by to consider the operator's history of violations, the size of the operator in comparison to the penalty amount, the operator's negligence, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).[15]

[15] The Secretary and Respondent stipulated to the fact that Respondent demonstrated good faith in abating the violation and the penalty will not affect Respondent's ability to remain in business.

Respondent has received six other citations under 30 C.F.R. § 57.8528 since October 14, 2009. The seriousness of the injury that could result from miners entering an area of bad or insufficient oxygen is grave. However, in an attempt to reduce the number of citations issued under the standard, Respondent created company policies that it believed complied with the regulations. While the Secretary carried her burden in proving that the violation was significant and substantial, the undersigned found that she has not met her burden in proving an unwarrantable failure. Further, the undersigned finds that an increase in penalty from a previous maximum of $285.00 to $35,000.00 is excessive. In light of the finding that the Order is not an unwarrantable failure to comply with a mandatory safety standard, a more reasonable penalty is $5,000.

ORDER

It is hereby **ORDERED** that Order No. 6482848 is **MODIFIED** from a 104(d)(2) order to a 104(a) citation. It is further **ORDERED** that Respondent **PAY** the Secretary of Labor the sum of $5,000.00 within 30 days of this Decision.[16]

/s/ John Kent Lewis
John Kent Lewis
Administrative Law Judge

Distribution:

Laura C. Bremer, Esq., Office of the Solicitor, U.S. Department of Labor, 90 7th Street, Suite 3-700, San Francisco, CA 94103

Laura E. Beverage, Esq., Jackson Kelly, PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202

[16] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

January 9, 2012

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. KENT 2010-1239 A.C. No. 15-02709-219112
v.	:	
HIGHLAND MINING COMPANY, LLC, Respondent	: :	Mine: Highland 9 Mine

DECISION

Before: Judge Rae

This case is before me upon a petition for assessment of the civil penalties filed under section 105(d) of the Federal Mine Safety and Health Act of 1977. At issue is Citation No. 8494886,[1] alleging a violation of 30 C.F.R.§75.220(a)(1), which requires a mine operator to develop and follow an approved roof control plan. On October 27, 2011, The Secretary of Labor ("Secretary") filed a Motion for Summary Decision. On October 28, Highland Mining submitted Respondent's Motion for Summary Decision and Respondent's Memorandum of Points and Authorities in Support of Motion for Summary Decision.

For the reasons set forth below, the Secretary's Motion for Summary Decision is **DENIED**. Respondent's Motion for Summary Decision is **GRANTED** and this case is **DISMISSED**.

Statement of the Case

Citation No. 8494886 was issued on April 7, 2010. This citation alleges that Highland Mining violated the mandatory safety standard encoded in 30 C.F.R. §75.220(a)(1), which provides:

> Each mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine. Additional measures shall be taken to protect persons if unusual hazards are encountered.

[1] The other 37 citations originally included in this docket were settled, and this settlement was approved by me in a Decision Approving Partial Settlement issued on August 19, 2011.

Citation No. 8494886 alleges that the following condition or practice resulted in the issuance of the Citation:

> The Approved Roof Control Plan dated 12/18/2009 is not being followed on the #5 unit (MMU-065). The #7 entry is not bolted to within 5 feet of the face. The last row of bolts if approximately 15 feet from the face. The plan on the bottom of page 10 states the faces will be bolted within 5 feet of the face.

As stated above, the parties have each filed a Motion for Summary Decision. Pursuant to Commission rules, a party moving for summary decision is entitled to a judgment in its favor if, based upon the record before the court, the record shows (i) that there is no genuine issue as to any material fact; and (ii) that the moving party is entitled to a summary decision as a matter of law. 29 C.F.R. §2700.67.

Facts[2]

The parties submitted a copy of the roof control plan at issue. Page 10 of the roof control plan is titled "Typical Bolting Sequence and Pattern for Dual Boom Bolters." This page depicts two maps showing required distances of intersections, as well as the placement of roof bolts. At the bottom of the page, in a smaller font, is the sentence "Dead end places will be bolted to within 5' of the face."

The roof control plan also provides a list of 32 numbered items titled "Safety Precautions for Full Bolting Plan." Item 27 states "Extended cuts greater than 20 feet will be bolted within 48 hours unless a condition such as loss of power, equipment failure or other factors beyond management's control exist which would prevent the bolting from being completed within the specified time."

At the time the citation was issued, the #7 entry was an active face. This entry had been mined approximately 10 hours before the citation was issued. (Resp.'s Motion for Summary Decision Ex. G.) The last row of roof bolts in the #7 entry was approximately fifteen feet from the face of the entry. (Citation No. 8494886; Resp.'s Motion for Summary Decision Ex. D at ¶6.)

Arguments

The Secretary, in her Motion for Summary Decision, argues that she is entitled to a summary decision as a matter of law because the #7 entry was not bolted within five feet of the face. The Secretary contends that the "intent of the statement in the [roof control] plan is to have any face bolted within five feet of each face to prevent the potential of any weakness to become a hazard." The Secretary also cites the fact that Highland has received eleven similar citations

[2]The parties were required to exchange proposed stipulations of fact by September 16, 2011. Respondent submitted a proposed stipulation of fact by this date, but the Secretary failed to provide any comment. Highland submitted the proposed stipulations to the court, as well as affidavit from Charles Lilly and Randy Duncan.

between June 11, 2007 and January 26, 2010. The Secretary has submitted documentation to show that Highland has not contested seven of these citations, opting instead to pay them without contest.

In its Response, Highland argues that page 10 of the roof control plan does not apply because the #7 entry was a working face, rather than a dead end face. Highland also contends that there is no evidence that the intent of the statement in the roof control plan was to require roof bolts within five feet of any face. Highland further contends that the citation was prematurely issued, as the roof control plan allows Highland 48 hours after mining an entry to install roof bolts in that entry. (Plan at p. 5, ¶27.) Highland also maintains that it is not precluded from contesting this citation merely because it has not contested allegedly similar citations in the past. These arguments are reiterated in Highland's Motion for Summary Judgment.

Analysis

I find that Highland is entitled to summary decision as a matter of law. The unambiguous wording of the roof control plan states that dead end places will be bolted within five feet of the face. Previous Commission cases have used the term 'dead end places' to refer to areas where mining has been abandoned. *See Green River Coal Co.*, 10 FMSHRC 1640, 1647 (referencing provision in ventilation plan requiring "all dead-end places shall be ventilated, and when practical, crosscuts will be provided at or near the face of each entry room before the place is abandoned.") The definition of dead end place as one where mining has been abandoned also fits in with dictionary definitions of the term dead end. *See Miriam Webster Dictionary* (11th ed. 2008)(defining "dead end" as "(i) to come to a dead end: TERMINATE; (ii) an end (as of a street) without an exit; (iii) a position, situation, or course of action that leads to nothing further.") Additionally, if page 10 of the roof control plan is interpreted as requiring roof bolts within five feet of any face, then the requirement on page five does not make sense. The requirement on page five allows Highland 48 hours after mining to install roof bolts in an entry. Under the Secretary's interpretation, if Highland installed roof bolts within 48 hours after mining an active face, Highland would be in compliance with page five, but would be in violation of page 10.

The Secretary does not dispute that the #7 entry was active at the time the citation was issued. Rather, the Secretary contends that Highland is in violation of the purpose of the plan. The Secretary does not point to any section of the roof control plan which requires roof bolts within five feet of an active face. The Secretary also does not provide evidence to show that page 10 of the roof control should be read to require roof bolting within five feet of an active face. The fact that Highland has paid similar citations, rather than contesting them, is not relevant. It is unclear whether the prior citations were in fact similar, as there is no evidence that the previous citations were issued for working faces or dead end faces. Additionally, a paid citation in the past is not an admission to the facts of the instant violation nor does it estopp Highland from contesting this alleged violation.. Considering all of this, I find the Secretary's argument without merit.

Additionally, I find that there is no genuine issue of any material fact. Both parties agree that the #7 entry was bolted approximately fifteen feet from the active face. As stated above, the Secretary does not dispute that the #7 entry was active at the time the citation was issued. Since these facts are not disputed, I find that summary decision is appropriate.

Order

It is **ORDERED** that the Secretary's Motion for Summary Decision is **DENIED**. Respondent's Motion for Summary Decision is **GRANTED** and this case is **DISMISSED**.

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

Distribution:

William L. Barnwell, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 100 YMCA Drive, Madisonville, KY 42431

Brad Oakley, Esq., Jackson Kelly, PLLC, 175 East Main Street, Lexington, KY 40588

/rar

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021
Telephone No.: 202-434-9950
Telecopier No.: 202-434-9981
January 9, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2011-72-M
Petitioner	:	A.C. No. 08-01015-234219
	:	
v.	:	
	:	
CEMEX CONSTRUCTION MATERIALS	:	
OF FLORIDA, LLC.	:	Mine: Krome Quarry
Respondent	:	

DECISION

Appearances: Robert Hendrix, Conference & Litigation Representative, U.S. Department of Labor, MSHA, Birmingham, Alabama, and Jeremy K. Fisher, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, on behalf of the Secretary of Labor;
Fernando Arturo Chavez, CEMEX Construction Materials, Miami, Florida, for CEMEX Construction Materials of Florida, LLC.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The petition alleges that CEMEX Construction Materials of Florida, LLC, is liable for three violations of the Secretary's Mandatory Safety and Health Standards for Surface Metal and Nonmetal Mines,[1] and proposes the imposition of civil penalties in the total amount of $1,095.00. A hearing was held in Miami, Florida. The parties made closing arguments, and waived further briefing. The parties were afforded an opportunity to submit citations to legal authority deemed relevant to their cases. Neither party did so. For the reasons that follow, I find that CEMEX committed two of the violations, and impose civil penalties in the total amount of $200.00.

Findings of Fact - Conclusions of Law

At all relevant times, CEMEX operated the Krome Quarry, located in Dade County, Florida, at which it drilled and blasted rock, collected material with a dragline, crushed rock, and turned out a variety of products, including sand and several sizes of stone. CEMEX operated several facilities in the State of Florida and elsewhere. Approximately 40 employees worked at

[1] 30 C.F.R. Part 56.

the quarry at the time of the inspection. Richard Woodall, an MSHA inspector, conducted a regular twice yearly inspection of the quarry on August 10 and 11, 2010, during which he issued several citations, three of which are at issue in this proceeding. Woodall has twenty years of mining experience, including seven years as an MSHA inspector. He was accompanied during the inspection by representatives of CEMEX, including Ray Valdez, the mine manger, and Fernando Chavez, a safety manager and CEMEX's representative at the hearing. The citations at issue are discussed below.

Citation No. 8544563

Citation No. 8544563 was issued at 2:26 p.m. on August 10, 2010, pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 56.13011, which requires that air receiving tanks "shall be equipped with indicating pressure gauges which accurately measure the pressure within the air receiver tanks." The violation was described in the "Condition and Practice" section of the Citation as follows:

> The air receiver tank located by the pressure washing area was not provided with a pressure gauge on the receiver tank itself. The gauge is needed to accurately measure the pressure in the tank. The employees working in the area around the receiver tank are exposed to the hazard of injury from the high pressure air if they don't know the pressure in the tank. There was an automatic pressure relief valve on the vessel to prevent the tank from being over-pressurized.

Ex. G-1.

Woodall determined that that the violation was unlikely to result in a lost-work-days injury, that the violation was not significant and substantial ("S&S"), that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $100.00 was assessed for this violation.

The Violation

Woodall observed a large tank that contained air pressurized by a compressor. There was a pressure relief valve mounted on the tank, but there was no pressure gauge mounted directly on the tank. Tr. 15. He observed a pressure gauge approximately 10 feet away from the tank that read 100 psi (pounds per square inch), which was the operating pressure of the tank. However, as he traced the lines to the gauge, he observed a gate valve in the line that could have isolated the pressure gauge from the tank. Tr. 16-17; Ex. G-2, R- . He did not close the valve in order to verify that it could isolate the gauge. Tr. 29-30. Woodall's concern was that the gauge could be isolated by the valve, or that dirt or some other obstruction could occur in the line, causing the gauge to reflect an inaccurate measure of the pressure in the tank.

Attempts to trace the pressure lines from the tank to the gauge on photographs of the installation met with limited success at the hearing. Tr. 31-34. However, Woodall testified that he had traced the lines during the inspection and determined that the valve was capable of isolating the gauge. Tr. 36-37. Woodall also had discussed the location of the gauge and valve with company representatives, who did not assert that the valve did not isolate the gauge. Tr. 36-37. CEMEX contends that the valve could not isolate the gauge. However, photographs of the installation do not clearly show the path of the line to the gauge, and videos show that the gauge functioned, but fail to establish that the valve was not capable of isolating the gauge. Ex. R-A, R-B, R-C. I credit Woodall's testimony and find that the gate valve was in the line leading from the tank to the gauge, and was capable of isolating the gauge. The violation was abated by the installation of a gauge on the tank itself.

The regulation requires that compressed air receiving tanks be equipped with pressure gauges. CEMEX's gauge was not located on the tank. Rather it was located some 10 feet away from the tank. Moreover, there was a gate valve on the line leading to the gauge that was capable of isolating the gauge from the tank. The gauge in question appears to have been providing an accurate reading of the pressure in the tank, at least while the valve was open. However, that does not alter the fact that the tank was not equipped with a gauge. It goes to the gravity of the violation, and Woodall determined that the violation was unlikely to result in an injury.[2]

I find that the regulation was violated, and that Woodall's assessments of gravity and negligence were accurate.

Citation No. 8544564

Citation No. 8544564 was issued at 2:36 p.m. on August 10, 2010, pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 47.41(a) which requires that operators "must ensure that each container of a hazardous chemical has a label." The violation was described in the "Condition and Practice" section of the Order as follows:

> There was a plastic one-gallon container in the welding storage trailer that was not labeled to identify the contents. The labels are needed to ensure that persons working in the area know what is in the container. Persons are exposed to the hazard of coming into

[2] CEMEX introduced a schematic drawing of a compressed-air braking system on a grader that shows a pressure gauge located remotely from a receiving tank. Ex. R-O. However, that is a piece of mobile equipment and the line runs directly from the tank to the gauge, which is most likely located in the operator's compartment. It is of marginal, if any, relevance to the conditions at issue.

> contact with a hazardous chemical. No one knew the contents of the container.

Ex. G-4.

Woodall determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $308.00 was assessed for this violation.

The Violation

While inspecting a trailer located in an area where welding was performed, Woodall observed a white plastic jug with no label on it, that contained an unidentified liquid. Tr. 53. The trailer was locked, but the welders and/or supervisors had keys. Tr. 57. Valdez tested the substance with his finger, against Woodall's advice, and found it to have an oily texture. Tr. 54. He suffered no adverse consequences as a result of his testing effort. Tr. 64. Efforts to identify the substance were unsuccessful. The jug was taken to a waste oil containment area and disposed of.

Woodall made his determination that an S&S violation had occurred, assuming a worst-case scenario. As he explained: "I did [assume the worst-case scenario], because it wasn't water. I mean, it was one of those. . . . I didn't know. Nobody knew what it was." Tr. 64. The Secretary's Hazardous Communication regulations are of relatively recent origin. The few cases that have been decided under the instant regulation have involved substances known to be flammable, which are identified in the regulation as posing a physical hazard. 30 C.F.R. § 47.11. *See, e.g.*, *Nelson Quarries, Inc.*, 30 FMSHRC 234 (April 2008) (ALJ) (unlabeled diesel fuel tank); *Spencer Quarries, Inc.*, 28 FMSHRC 1005 (Nov. 2006) (ALJ) (unlabeled propane tank).

The regulation at issue requires that each container *of a hazardous chemical* has a label. When charging a violation of that regulation, the Secretary, who has the burden of establishing each element of a violation by a preponderance of the evidence,[3] must prove that the container held a hazardous chemical, as defined in the regulations. Woodall candidly admitted that he did not know what the substance was. He opined that a substance that had an oil base would pose a "health or building hazard." Tr. 65. However, the fact that it appeared to have an oily texture falls short of establishing that it had an oil base, or that it was hazardous as defined in the regulations.

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[3] *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd., Secretary of Labor v. Keystone Coal Mining Corp.,* 151 F.3d 1096 (D.C.Cir. 1998); *ASARCO Mining* Co., 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources Inc.*, 9 FMSHRC 903, 907 (May 1987).

It is possible that CEMEX violated some other provision of the HazCom regulations, for example, section 47.21, which requires that operators evaluate each chemical brought on mine property and each chemical produced on mine property to determine if it is hazardous. However, considering the virtual absence of evidence as to the composition or nature of the substance, I find that the Secretary has failed to carry her burden of proving that the container held a hazardous chemical. The citation will be vacated.

Citation No. 8544565

Citation No. 8544565 was issued at 9:20 a.m. on August 11, 2010, pursuant to section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 56.12018, which requires that: "Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location." The violation was described in the "Condition and Practice" section of the Order as follows:

> There was a 120-volt energized breaker in the electrical panel box in the MCC Room A that was not properly labeled to identify what circuit it controlled. The energized breaker was marked in the panel box as a spare, but had a wire hooked to it. No one knew what it went to. Persons could receive a fatal shock if an unintentional electrical fault occurred while persons were contacting whatever the mislabeled breaker controlled and persons did not know what to shut down.

Ex. G-7.

Woodall determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $687.00 was assessed for this violation.

The Violation

When Woodall inspected Room A in the MCC, he noticed that a circuit breaker that was labeled as a spare was in the "on" position, which to him threw up a "red flag." Tr. 69; Ex. G-8, R-H. He had someone take the cover plate off, and observed a wire connected to the breaker. No one knew what the wire was connected to, i.e., what that circuit energized. Tr. 70. The wire was disconnected. The breaker then did not control a circuit and was rendered a spare. It was later determined that the circuit energized a light. Tr. 82-83; Ex. R-I.

The breaker, a principal power switch, was not labeled to show what it controlled, and there is no contention that identification could have been made readily by location. Consequently, the standard was violated.

Significant and Substantial

The Commission recently reviewed and reaffirmed the familiar *Mathies*[4] framework for determining whether a violation is S&S. As explained in *Cumberland Coal Res.*, 33 FMSHRC ___, ___ (October 5, 2011):

> The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, 6 FMSHRC 1, the Commission further explained:
>
> > In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
>
> *Id*. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 6 FMSHRC 1824, 1836 (Aug. 1984).
>
> . . . .
> . . . .
>
> The Commission recently discussed the third element of the *Mathies* test in *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) ("*PBS*") (affirming an S&S violation for using an inaccurate mine map). The

[4] *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984) .

> Commission held that the "test under the third element is whether there is a reasonable likelihood that the hazard contributed to by the violation, i.e., [in that case] the danger of breakthrough and resulting inundation, will cause injury." *Id*. at 1281. Importantly, we clarified that the "Secretary need not prove a reasonable likelihood that the violation itself will cause injury." *Id*. The Commission also emphasized the well-established precedent that "the absence of an injury-producing event when a cited practice has occurred does not preclude a determination of S&S." *Id*. (citing *Elk Run Coal Co.*, 27 FMSHRC 899, 906 (Dec. 2005); and *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996)).

The fact of the violation has been established. A measure of danger to safety, a discrete safety hazard, was contributed to by the failure to label the circuit, i.e., that a person might unintentionally come into contact with an energized wire or piece of equipment that was thought to be de-energized. Any injury resulting from the violation would most likely involve contact with a live 120-volt electrical circuit which could easily be reasonably serious, or even fatal, given the conditions in the area. Tr. 72. As is often the case, the primary issue in the S&S analysis is whether the hazard contributed to by the violation was reasonably likely to result in an injury.

Woodall determined that an injury was reasonably likely because "no one knew what the energized breaker went to." Tr. 72. He based his gravity determination on the fact that a person could unintentionally come into contact with the live circuit and suffer a potentially fatal shock, in part because a person could be sweating in Florida in August, or it could be raining. Tr. 72. Eduardo Yi, a project manager for CEMEX, is an electrical engineer who has worked in the mining industry for thirty years. He testified that, following the inspection, it was determined that the mislabeled circuit controlled a light that was mounted on a steel column, a picture of which was introduced into evidence. Tr. 82; Ex. R-I. He opined that the light fixture appeared to be in good condition, and that no one would have been exposed to an electrical hazard by contacting the energized light fixture. Tr. 83. Yi also described CEMEX's established procedures for working on electrical equipment. Only qualified electricians are allowed to work on electrical equipment, and a strict lock-out, tag-out policy is in place. An electrician working on a piece of equipment would check with a test meter to make sure there was no power to the unit, both before and after the lock-out procedure. Tr. 83-86.

I do not place great weight on Woodall's evaluation of gravity. It was made on the basis of unknown factors. Certainly the fact that the breaker controlled an unknown energized circuit presented a potentially significant, but unknown, possibility of injury. In fact, however, the circuit powered a light fixture that appeared to be in good condition, allowing possibility of injury to be assessed more accurately. I agree with Yi that an injury was unlikely. Woodall's explanation of the severity of any injury was also clouded by the fact that he did not know what circuit the breaker controlled, and his elevation to the fatal level based on potentially wet conditions strikes me as somewhat speculative. I find that if an injury occurred it would most

likely have resulted in lost work days or restricted duty. I agree that CEMEX's negligence was moderate.

CEMEX relied on a Commission Administrative Law Judge decision affirming a citation for a similar violation involving an unlabeled 480-volt power circuit that an experienced MSHA electrical specialist evaluated as unlikely to result in an injury. *Omya Arizona, a division of Omya Inc.*, 33 FMSHRC ___ (Nov. 3, 2011) (ALJ).[5] While there are, no doubt, other examples of such violations having been evaluated as S&S, the facts of this case are similar to those in *Omya*, and the inspector's assessment in that case, which was based upon known facts, is consistent with finding that the instant violation was not S&S.

The Appropriate Civil Penalties

The MSHA assessment sheet reflects that Krome Quarry is a small to moderate sized mine, as is its controlling entity, and that it had a negligible history of violations. The parties stipulated that the proposed penalties would not affect CEMEX's ability to continue in business, and that CEMEX demonstrated good faith in abating the violations.

Citation No. 8544563 is affirmed in all respects. A civil penalty of $100.00 was assessed by the Secretary. Considering the factors enumerated in section 110(i) of the Act, and guided by the Secretary's penalty assessment regulations, I impose a penalty in the amount of $100.00.

Citation No. 8544565 is affirmed. However, the violation was unlikely to result in a lost work days or restricted duty injury, not reasonably likely to result in a fatality, and it was not S&S. A civil penalty of $687.00 was assessed by the Secretary. Considering the reduction in the level of gravity, the factors enumerated in section 110(i) of the Act, and guided by the Secretary's penalty assessment regulations, I impose a penalty in the amount of $100.00.

ORDER

Citation No. 8544564 is **VACATED**. Citation No. 8544563 is **AFFIRMED**, and Citation No. 8544565 is **AFFIRMED as modified**. Respondent is **ORDERED** to pay civil penalties in the total amount of $200.00 within 45 days.

/s/ Michael E. Zielinski
Michael E. Zielinski
Senior Administrative Law Judge

[5] CEMEX also attempted to offer into evidence a Commission ALJ's Decision Approving Settlement in which the gravity of a similar violation was reduced. The Secretary's objection to that exhibit was sustained. Tr. 87-90.

Distribution:

Robert Hendrix, Conference Litigation Representative, U.S. Department of Labor, MSHA, 135 Gemini Circle, Ste. 212, Birmingham, AL 35209-5842

Jeremy K. Fisher, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, GA 30303

Fernando Arturo Chavez, CEMEX Construction Materials FL, LLC, 13292 NW 118th Ave., Miami, FL 33178

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

January 10, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-1490-M
Petitioner	:	A.C. No. 50-01729-159523
	:	
v.	:	
	:	
STATE OF ALASKA,	:	Mine: Sag Screener
DEPT. OF TRANSPORTATION,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Feldman

This matter presents the issue of whether State of Alaska Department of Transportation ("Alaska") front-end loaders used in conjunction with a mobile Sag Screener are subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, as amended, U.S.C. § 801 *et seq.* (2006) ("Mine Act"). The front-end loaders are used to maintain a 420-mile unpaved haul road that is used to service the Alaska pipeline. The loaders transfer rock, gravel and sandy material that has been screened by the mobile Sag Screener from a series of pits located along the haul road. The Secretary's jurisdictional claim is based, in part, on Alaska's acquiescence in 2002, upon the insistence of the Mine Safety and Health Administration ("MSHA"), to register the mobile Sag Screener as a mine. The Sag Screener has been assigned Mine ID No. 5001729.

At issue are Citation Nos. 6444323 and 6444324 citing alleged non-significant and substantial ("S&S") violations of mandatory safety standards in Part 56 of the Secretary's regulations governing surface metal and non-metal mines. 30 C.F.R. Part 56. Citation No. 6444323 concerns exposed wires from a bushing on a Case 921C Front-End Loader in violation of the mandatory standard in 30 C.F.R. § 56.12004 that requires such conductors to be protected from mechanical damage. Citation No. 6444324 concerns an inoperable backup alarm on a Volvo BM2150 Front-End Loader in violation of 30 C.F.R. § 56.14132(a) that requires backup alarms to be maintained in functional condition. The Secretary seeks to impose a civil penalty of $100.00 for each of the cited violations.

Alaska has filed a motion to dismiss the subject citations for lack of Mine Act jurisdiction based on the assertions that: (1) the products, taken from borrow pits, do not enter or affect commerce because the extracted materials are used exclusively by Alaska and are not offered for commercial sale; and (2) the sag screening operations are conducted solely for the purpose of maintaining the haul road and are not lands from which minerals are extracted and/or

milled as contemplated by the definition of a mine in section 3(h)(1) of the Mine Act. (*Resp. Mot.* at 5-7). Included within the statutory definition of "coal or other mine" in Section 3(h)(1)(C) is "equipment . . . used in . . . the work of extracting such minerals from their natural deposits . . . or used in . . . the milling of such materials." 30 U.S.C. § 802(h)(1).

The Secretary opposes Alaska's motion. The Secretary asserts the maintenance activities performed at the haul road come within the purview of the section 3(h)(1)(C) statutory definition of "a mine" because the mobile screening activities, which occur at numerous sites located along the haul road, constitute milling. The Secretary relies on a decision by Judge Miller that an Alaska mobile screener was subject to Mine Act jurisdiction. *State of Alaska, Department of Transportation*, 33 FMSHRC 1550 (June 2001) (ALJ). In that case, the mobile screener was used to size sand that was removed from several off-site locations, including two beach locations. The screened sand was transported to the Nome, Alaska airport where it was stockpiled for future use to treat icy conditions on runways. *Id.* at 1551. Any unscreened sand brought to the airport from off-site locations was screened before being stockpiled. *Id.*

As discussed herein, the Secretary's jurisdictional claim is denied because it is inconsistent with the 1979 MSHA and the Occupational Safety and Health Administration ("OSHA") Interagency Agreement exempting certain borrow pits from the broad reach of the Mine Act. Moreover, even if the Secretary has the discretion to disregard the Interagency Agreement, the exercise of MSHA jurisdiction must be denied because it is based on a superficial reliance on the subject screening activities, rather than a reasoned functional analysis of whether those activities are normally performed by mine operators. *See, e.g., Oliver M. Elam, Jr., Co.,* 4 FMSHRC 5, 6 (Jan. 1982). While I agree with Judge Miller's decision that Alaska's off-site sand removal, screening and storage at the Nome airport were comparable to activities normally performed by mine operators, the facts in Judge Miller's case are not analogous to the subject screening and use of local borrow pit material for road maintenance.

I. Background

Alaska's Motion to Dismiss summarizes the material facts in this matter:

> In 1973, Congress enacted the Trans Alaska Pipeline Authorization Act and authorized the issuance of federal contracts, permits, and rights-of-way needed to construct the 800-mile oil pipeline from Prudhoe Bay to Valdez, Alaska. *See*, 43 U.S.C. § 1652(b). In order to construct the Trans Alaska Pipeline, and to support oil field development at Prudhoe Bay on Alaska's North Slope, it was evident at the outset that an all weather haul road would be needed from the farthest north highway extension, north of Fairbanks, all the way to Prudhoe Bay. The haul road (which later was officially named the Dalton Highway; *see*, AS 19.40.015) extends a distance of 420 miles. All but the southernmost portion of the Dalton Highway is located north of the Arctic Circle and was constructed across barren terrain where no all-season roads existed.

> As a matter of compliance with state and federal law, and to ensure the safety of the traveling public, the AKDOT must maintain the Dalton Highway. 23 U.S.C. § 116; AS 44.42.020. Maintenance of the Dalton Highway, which has a gravel surface in the summer and an ice surface for the remainder of the year, requires the use of sand and gravel. The AKDOT produces and stockpiles sand and gravel in borrow pits located within the Dalton Highway right-of-way corridor. The AKDOT produces its own sand and gravel, for a two-to-three week period every other year, because there are no commercially available sources of sand and gravel on the entire length of the Dalton Highway.
>
> AKDOT uses approximately forty borrow pits along the Dalton Highway. Each of the borrow pits is a 'workplace' as that term is defined by state and federal safety and health laws. The borrow pits, and all activities that occur within the borrow pits are fully regulated by Alaska Occupational Safety and Health ("AKOSH"). *None of AKDOT's forty borrow pits along the Dalton Highway are registered with MSHA as a "mine."* Upon MSHA's insistence, in 2002 AKDOT registered the Sag Screener – a portable piece of equipment – as a "mine".
>
> The borrow pit where the subject MSHA inspection occurred is located at Mile 144 of the Dalton Highway, a location 235 miles north of Fairbanks. The State of Alaska received federal authorization prior to the construction of the haul road, pursuant to the Federal Aid to Highways Act, 23 U.S.C. § 317, to use materials from this borrow pit (BLM Material Source Site No: F-93007). The State of Alaska does not pay the federal government, or any other entity, for the use of this publicly-owned borrow pit, which provides construction and maintenance materials for the publicly-owned Dalton Highway.

Resp. Mot. at 2-3. (Emphasis added).

All haul road maintenance activities with respect to safety are regulated by the Alaska Department of Occupation Safety and Health. At the time the citations were issued on June 23, 2008, the front-end loaders were used to transport material from the Sag Screener, which was located at a large previously opened pit that was approximately one-quarter mile from the haul road. *Sec'y Resp.* at 2. There were three individuals working on site. *Id.* The material excavated from the pit was loaded onto the Screener which separated it into different sizes of rock. *Id.* Three conveyor belts carried the rock from the Screener to three separate piles. *Id.* The front-end loader conveyed the rock material to the haul road for repair. *Sec'y Resp.* at 2. The Secretary avers that the rock material "had commercial value."[1] *Id.*

[1] Obviously, any material has a fitness for purpose use to the user. The relevant issue is whether the end-product resulting from the activities claimed to be mining is a marketable commodity based on its intrinsic value.

II. Federal Jurisdiction Based on Commerce Clause

As a threshold matter, with respect to the jurisdictional objection raised by Alaska, it is well settled that intrastate activities which affect interstate commerce may be regulated by federal statute. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.,* 452 U.S. 264, 281 (1981). In this regard, in *Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683 (Apr. 1994), the Commission stated:

> The Commerce Clause of the Constitution has been broadly construed for over 50 years. Commercial activity that is purely intrastate in character may be regulated by Congress under the Commerce Clause, where the activity, combined with like conduct by others similarly situated, affects commerce among the states. *Fry v. U.S.*, 421 U.S. 542, 547 (1975); *Wickard v. Filburn*, 317 U.S. 111 (1942) (growing wheat solely for consumption on the farm on which it is grown affects interstate commerce). Congress intended to exercise its authority to regulate interstate commerce to the 'maximum extent feasible' when it enacted section 4 of the Mine Act. *Marshall v. Kraynak*, 604 F. 2d 231, 232 (3d Cir., 1979), *cert denied* 444 U.S. 1014 (1980); *United States v. Lake*, 985 F. 2d 265, 267-69 (6th Cir. 1993). In *Lake*, the mine operator sold all its coal locally and purchased mining supplies from a local dealer 985 F. 2d at 269. Nevertheless, the court held that the operator was engaged in interstate commerce because 'such small scale efforts, when combined with others, could influence interstate coal pricing and demand.' *Id.*

16 FMSHRC at 686.

In this case, the haul road is used to maintain the Trans Alaska Pipeline, and to support oil field development at Prudhoe Bay. It is undeniable that the development and transmission of this energy source has a significant and fundamental impact on the national economy. Such activities provide a basis for federal jurisdiction as contemplated by the Commerce Clause.

III. Whether Alaska's Screening Constitutes "Milling" Subject to the Mine Act

a. *Chevron* Analysis

Having concluded that Alaska's borrow pit screening activities are subject to federal jurisdiction, the focus shifts to whether Alaska's milling activities at numerous locations adjacent to the 420-mile haul road are subject to Mine Act jurisdiction. As noted, section 3(h)(1) of the Act defines a "coal or other mine" to include "equipment . . . used in . . . the milling of . . . minerals." 30 U.S.C. § 802(h)(1). Section 3(h)(1) further provides that, in determining

"what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment." *Id.* The term "milling" is not defined in the Act.

The Commission has set forth the parameters for determining the reasonableness of the Secretary's assertion that an entity's activities constitutes "milling" under section 3(h)(1) of the Act. *Watkins Engineers & Constructors*, 24 FMSHRC 669 (July 2002). The Commission stated:

> The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union No. 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). However, when a statute is ambiguous or silent on a point in question, a further analysis is required to determine whether an agency's interpretation of the statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994). Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy W. Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *See Joy Techs., Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997) (citing *Chevron*, 467 U.S. at 843); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).
>
> The Supreme Court recently recognized that *Chevron* deference is appropriately applied to an agency's interpretation of a statute when Congress delegated authority to the agency to speak with the force of law when it addresses ambiguity or "fills in a space" in the statute and the agency's interpretation claiming deference was promulgated in the exercise of that authority. *United States v. Mead Corp.*, 533 U.S. 218, 226-27, 229 (2001). Section 3(h)(1) contains an express delegation of authority to the Secretary to determine what constitutes milling. *See In re: Kaiser Aluminum and Chem. Co.*, 214 F.3d 586, 591 (5th Cir. 2000) ("Congress expressly delegated to the Secretary . . . authority to determine what constitutes mineral milling") (internal quotations omitted), *cert. denied*, 532 U.S. 919 (2001). Thus, Congress explicitly left a gap for the Secretary to fill with respect to the definition of milling. Under *Mead*, 533 U.S. at 227, the Secretary's interpretation of milling is entitled to acceptance if it is reasonable. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone Coal*, 16 FMSHRC at 13. *Id.* at 672-73.

b. OSHA/MSHA Interagency Agreement

Consequently, disposition of the jurisdictional question hinges on whether the Secretary's assertion that Alaska's screening activities constitute milling is reasonable. Resolution of this issue requires consideration of the Secretary's Interagency Agreement, as well as application of the traditional functional analysis to determine if the subject activities are normally performed by a mine operator. As a threshold matter, in 1979, consistent with the statutory authority delegated to the Secretary in section 3(h)(1) to unify jurisdiction under the oversight of one Assistant Secretary, the Mine Safety and Occupational Safety and Health divisions entered into an Interagency Agreement. 44 Fed. Reg. 22827 (Apr. 17, 1979).

The Interagency Agreement noted that:

> Milling is the art of treating the crude crust of the earth *to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents* of the crude from the undesired contaminants with which it is associated.

Id. at 22829. (Emphasis added).

In other words, milling is an upgrading process that involves the separation of valuable minerals from earthen material. *Id.* The Secretary asserts that the subject screening process constitutes milling because the separated rock material has an intrinsic value. The Secretary's reliance on the concept of intrinsic value is misplaced. Milling concerns a process performed to make the end-product suitable for a particular use or to meet market expectations. *Oliver Elam,* 4 FMSHRC at 8. Examples are crushing and grinding activities at a quarry that pulverize minerals for the purpose of creating various materials for end-users. As distinguished from the instant case, the materials are typically transported by or to the consumer for use at a desired location because of the materials' intrinsic value.

Here, however, the screened rock is bulk material extracted from numerous areas adjacent to the haul road as a matter of convenience. As described in the Interagency Agreement, such bulk material is characterized as a "borrow pit." Alaska's intermittent seasonal use of the mobile Sag Screener to separate different sizes of rock, as the fitness for purpose need arises to fill the haul road, does not rise to the level of "milling" products to meet market specifications.

The Interagency Agreement delineates the elements of a borrow pit and resolves jurisdictional questions. The Agreement states:

> "Borrow Pits" are subject to OSHA jurisdiction except those borrow pits located on mine property or related to mining. (For example, a borrow pit used to build a road or construct a surface facility on mine property is subject to MSHA jurisdiction). "Borrow Pit" means an area of land where the overburden,

> consisting of unconsolidated rock, glacial debris, other earthen material overlying bedrock is extracted from the surface. *Extraction occurs* on a one-time only basis or *only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for use of a scalping screen to remove large rocks*, wood and trash. *The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit.*

44 Fed. Reg. at 22828 (Apr. 17, 1979). (Emphasis added).

To further explain its jurisdiction, or lack thereof, over borrow pits, MSHA adopted interpretive guidelines in 1996 to clarify its 1979 Interagency Agreement. The guidelines provide in pertinent part:

> Thus, if earth is being extracted from a pit and is used as fill material in basically the same form as it is extracted, the operation is considered to be a "borrow pit." *For example, if a landowner has a loader and uses bank run material to fill potholes in a road*, low places in the yard, etc., *and no milling or processing is involved, except for the use of a scalping screen, the operation is a borrow pit. The scalping screen can be either portable or stationary and is used to remove large rocks*, wood or trash. In addition, whether the scalping is located where the material is dug, or whether the user of the material from the pit is the owner of the pit or a purchaser of the material from the pit, does not change the character of the operation, as long as it meets the other criteria.

MSHA *Program Policy Manual*, Section 4, I.4-3 (1996). (Emphasis added).

I stress that I recognize that the legislative history of the Mine Act supports the proposition that Congress intended a broad interpretation of what constitutes a "coal or other mine." In this regard, the Senate Committee stated that "what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possibl[e] interpretation, and … doubts [shall] be resolved in favor of … coverage of the Act." S. Rep. No. 95-181, 95th Cong., at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) ("*Legis. Hist.*"). *See Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3d Cr. 1979), *cert. denied*, 444 U.S. 1015 (1980).

Although doubt provides a basis for broadly interpreting the Mine Act's jurisdictional scope, it is disingenuous to find doubt where none exists. The Secretary's proffered interpretation is undermined by the Interagency Agreement and subsequent guidelines. These documents reflect the Secretary's recognition that the use of a scalping screen to maintain a road, by using material removed from areas located in close proximity to the road, does not provide an adequate basis for Mine Act jurisdiction. Consequently, the Secretary's assertion that the subject screening activities now constitute "milling" under section 3(h)(1) of the Act is, at best, arbitrary.

c. Functional Analysis

I am also cognizant that, arguably, the Secretary is not bound by the terms of the Interagency Agreement because section 3(h)(1) authorizes the Secretary "to give due consideration to the convenience of administration" when delineating OSHA and MSHA oversight. However, even if the Secretary elected to disregard the terms of the Interagency Agreement, conferring MSHA jurisdiction would be contrary to the traditional functional analysis that has been utilized by the Commission and the Courts to resolve questions of Mine Act jurisdiction.

The seminal case in this regard is *Oliver M. Elam, supra*, wherein despite acknowledging the broad reach of the Mine Act, the Commission determined Elam's activities, as a commercial dock operator who loaded coal onto barges, to be outside the coverage of the Act. *Elam* noted that "inherent in the determination of whether an operation is properly classified as "mining" is an inquiry not only into whether the operation performs one or more of the listed work activities [in section 3(h)(1) such as milling], but also into the nature of the operation performing such activities." *Elam,* 4 FMSHRC at 7 (emphasis in original). *Elam* established a two prong test: (1) whether the subject activities are normally performed by a mine operator; and (2) whether the activities performed are undertaken to make the extracted material suitable for a particular use or to meet market specifications. *Id.* at 8.

Consistent with *Elam*, in a split decision in *Kinder Morgan*, the Commission identified the relevant considerations for determining whether the processing and handling of extracted material constitutes mining. Such considerations include the degree of handling and transportation performed, and whether such handling and use is the type normally performed by a mine operator rather than an end-use consumer. *Kinder Morgan Operating L.P. "C,"* 23 FMSHRC 1288, 1296 (Dec. 2001) citing *Herman v. Associated Elec. Coop., Inc.*, 172 F.3d 1078, 1082-83 (8th Cir. 1999) (finding no Mine Act jurisdiction based on such factors as whether coal had entered the stream of commerce; the degree to which the coal was processed by the cited entity; and whether such handling was that which is usually performed by an end-use consumer); *RNS Servs., Inc. v. Sec'y of Labor*, 115 F.3d 182, 185 (3d Cir. 1997) (finding Mine Act jurisdiction based, in part, on consideration that MSHA exercised jurisdiction over a company that handled coal after the cited entity), *aff'g RNS Servs. Inc.*, 18 FMSHRC 523 (Apr. 1996).

Although the above cited cases concern jurisdictional issues with regard to entities that handled and loaded coal, the Commission has continued to apply a traditional functional analysis to resolve whether particular milling activities are covered by the Act. *Watkins Engineering & Constructors*, 24 FMSHRC at 669 (July 2002). Specifically, the Commission stated:

> Within the industry, milling is defined as: "The grinding or crushing of ore. The term *may* include the operation of removing valueless or harmful constituents … ," while mill is defined as a "mineral treatment plant in which crushing, wet grinding, and further treatment of ore is conducted." *DMMRT* at 344 (emphasis added); *see also Alcoa Alumina & Chems., L.L.C.*, 23 FMSHRC

> 911, 914 (Sept. 2001) (using *DMMRT* to determine usage in mining industry). The ordinary meaning of "to mill" is "to crush or grind (ore) in a mill," and the term "a mill" is defined as "a machine for crushing or comminuting some substance." *Webster's Third New Int'l Dictionary (Unabridged)* 1434 (1993); *see also Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1060 (Sept. 2000) ("Commission … look[s] to the ordinary meaning of terms not defined by statute"). These definitions are consistent with the Secretary's interpretation that milling includes processes such as grinding and crushing, [although] the separation of waste from valuable materials is not an essential component of milling.

Id. at 674-75. (Footnote omitted).

The separation of materials of differing sizes is inherent in the screening process. While it is true that screening is commonly performed during milling, such screening normally sizes materials that have already been subject to the principal elements of milling, such as crushing and/or grinding. Thus, concluding that Alaska's activities are subject to Mine Act jurisdiction simply because Alaska uses a screen to separate earthen material, when no transformation of the quality of the material occurs, begs the question. As acknowledged in the Interagency Agreement, local screening alone, for the purpose of repairing non-mine roadways, typically does not provide a basis for Mine Act jurisdiction.

Turning to the facts of this case, Alaska's screening activities are not performed at a centralized preparation facility for the purpose of creating a marketable consumer derivative. In this regard, there are no processing procedures such as grinding or crushing that are accomplished by utilizing sophisticated equipment or techniques. Nor is the end-product in this case, screened rocks, crushed or stockpiled at a central location, or, transported to off-site locations to be used for its intrinsic value. Rather, the screened rock residual is recovered, as bulk material, as a matter of convenience, to seasonally fill and repair a gravel haul road. Thus, applying the longstanding two-pronged *Elam* test, the screening activities in this matter are neither principal activities normally performed in the mineral milling process, nor activities undertaken to make the extracted rock material suitable for a particular use meeting market specifications. Consequently, there is an inadequate basis for concluding that the screening activities performed constitute "milling" as contemplated by section 3(h)(1) of the Act.

d. Distinguishable Case Law

The conclusion that the subject screening activities performed by Alaska do not constitute mining is not inconsistent with the decision by Judge Miller. *State of Alaska,* 33 FMSHRC 1550. Judge Miller found Mine Act jurisdiction with regard to an Alaska mobile screener that was used to spread sand and gravel on runways at the Nome, Alaska airport. *Id.* The Nome screener was used to size sand and gravel into three products: (1) undersized ¼ inch minus aggregate, (2) midsized ¼-½ inch aggregate, and (3) oversized ½ inch plus aggregate. *Id.* The gravel was used to sand airport runways to prevent airplanes from sliding on ice and snow. *Id.*

The Nome Screener was used by the State of Alaska Department of Transportation (AKDOT) annually at various locations, including two AKDOT owned ocean beach borrow pits, for a three to four week period in order to stockpile enough sand for use in the winter. *Id.* at 1551. At these locations, front-end loaders placed unsorted sand into the screener and then loaded the processed mid-sized sand into trucks that then transported the material for use at the Nome airport. *Id.* On other occasions, trucks hauled beach sand from the borrow pits to a warehouse yard at the Nome airport where the screener was used to size the sand. *Id.* The Nome Screener was stored at the airport when not in use. Like the Sag Screener in the current case, the Nome Screener was registered as a mine in 2002, as requested by MSHA. *Id.*

Although Judge Miller's case and this case both involve Alaska screening activities, the particular circumstances are significantly different. In Judge Miller's case, Alaska screened, sized and transported material from various locations, including two beach borrow pits. The sand, a material having commercial intrinsic value, was transported to the Nome airport where it was applied to runways, or, stored at an airport warehouse after further screening and sizing. Screening, sizing, and stockpiling at a storage facility are functions normally performed by a mine operator.

In rejecting Alaska's contention, that the beach-originated sand was a "borrow pit" exempt from the Mine Act, Judge Miller relied on prior case law limiting the interpretation of the "borrow pit" exemption. However, these cases are readily distinguishable from the instant case. For example, in *Kerr Enterprises, Inc.,* 26 FMSHRC 953 (Dec. 2004) (ALJ), unlike the instant case, the entity deemed to be mining, which extracted clay, sand, and topsoil screened at an excavation site, *sold the processed product* to more than 50 customers, including landscape companies, construction contractors, and concrete companies. *Id.* at 954.

Judge Miller also relied on *New York State Department of Transportation*, 2 FMSHRC 1749 (July 1980) (ALJ), to support Mine Act jurisdiction. Unlike this case, New York extracted sand from a central location known as the Underwood Pit. *Id.* at 1753 The sand was stockpiled at this location for winter disbursement on Essex County highways to alleviate winter snow and ice conditions. *Id.* The screening, central stockpiling, and ultimate transporting of sand for the treatment of a system of county roads and highways, is inapposite to the facts in this matter concerning the local use of borrow pit material that was transported one-quarter mile to maintain a gravel road. *Id.*

In addition, Judge Miller relied on *Fred Knobel*, 15 FMSHRC 742 (Apr. 1993) (ALJ). Fred Knobel operated a portable rock crusher at various construction sites. *Id.* at 743. The rock crusher was used to crush rock for subcontracts with other construction companies. *Id.* The crushed rock was used as an underlayment for residential driveways or sold to various contractors who hauled it away for a use elsewhere. *Id.* at 744. As in *Kerr*, and in *New York State DOT*, the end product in *Fred Knoble*, was sold to end-use consumers and/or transported to various locations, because of its intrinsic market value. *Id.*

It is worth noting that the leading cases concerning Mine Act jurisdiction over screening activities involve the processing and selling of sand and gravel from material that had previously been dredged from riverbeds. *See Jerry Ike Harless Towing, Inc.,* 16 FMSHRC 683, 684 (Apr. 1994); *Marshall v. Stoudt's Ferry Preparation Co.,* 602 F.2d 589 (3d Cir. 1979), *cert denied*, 444 U.S. 1015 (1980). Such activities are readily distinguishable from the borrow pit activities in this matter. Consequently, unlike the instant case, the cases that support the exercise of Mine Act jurisdiction for screening activities have the common thread of the processing, stockpiling, transportation, and/or sale of mineral products having a market value that ultimately will be consumed by end-users.

In view of the above, the Secretary's asserted jurisdictional claim over Alaska's haul road screening activities is inconsistent with the Secretary's Interagency Agreement. Moreover, declining to find an adequate basis for the Secretary's assertion of MSHA jurisdiction is consistent with previous cases where MSHA jurisdiction was based on satisfaction of a traditional functional analysis. The registration of the Sag Screener as a mine cannot confer jurisdiction when none exists. Thus, this decision to vacate the citations concerning front-end loaders should be narrowly construed as it is based solely on the subject screening activities that do not constitute milling as contemplated by the Mine Act.

As a final matter, I note, parenthetically, that sovereign entities, such as Alaska, can be subject to Mine Act jurisdiction if they engage in activities that result in the production of mineral end-products of commercial value even though the end-products are intended for government use. As discussed herein, resolution of jurisdictional questions ultimately must be based on whether the subject activities are normally performed by a mine operator. While the federal reach of the Mine Act is expansive, it is not intended to infringe on reasonable assertions of jurisdiction by state authorities over activities, such as road maintenance, that are not traditionally viewed as mining. In this regard, the borrow pit activities in this matter are authorized under a federal statute in 23 U.S.C. § 317 which appropriates *adjacent* federal lands for the purposes of construction or maintenance of highways.

ORDER

In view of the above, **IT IS ORDERED** that the State of Alaska's Motion to Dismiss the subject citations for lack of Mine Act jurisdiction **IS GRANTED**. Accordingly, **IT IS ORDERED** that Citation Nos. 6444323 and 6444324 **ARE VACATED**. Consequently, the captioned civil penalty proceeding **IS DISMISSED**.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution: (Regular and Electronic Mail)

Matthew L. Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor,
1111 Third Avenue, Suite 945, Seattle, Washington 98101-3212

John D. Pereza, Conference & Litigation Representative, U.S. Department of Labor,
MSHA, 2060 Peabody Rd., Suite 610, Vacaville, CA 95687

Sean P. Lynch, Assistant Attorney General, State of Alaska - Department of Law,
Civil Division - Transportation Section, P.O. Box 110300, Juneau, AK 99811

/jel

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

January 11, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY & HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2011-76-M
Petitioner,	:	A.C. No. 39-01412-234368
	:	
v.	:	
	:	Gravel Pit
GRAVEL PIT COMPANY	:	
Respondent.	:	

DECISION

Appearances: Pamela F. Mucklow, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Albert Lee Yager, Owner, Gravel Pit Company, Madison, South Dakota, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA") against the Gravel Pit Company pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act").

Albert "Lee" Yager owns and operates a sand and gravel quarry near Madison, South Dakota, that operates under the name Gravel Pit Company. It is a small, intermittent quarry that includes a crushing plant. The case involves one section 104(a) citation. An evidentiary hearing was held and the parties introduced testimony and documentary evidence.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

On August 17, 2010, MSHA Inspector James M. Peck issued Citation No. 6588043 to Mr. Lee Yager for an alleged violation of section 56.14107(a) of the Secretary's safety standards. The citation states:

> The mine operator had a tail pulley on the Kolhman screen plant conveyor that was not adequately guarded to protect persons from contacting the moving machine parts that can cause injury. This condition exposes miners to the hazard of becoming entangled.

> The rear section of the tail pulley was not guarded creating an opening [of approximately] 29 inches across the top, 15 inches across the bottom and 25 inches tall. The tail pulley was 28 inches from the outside framework. Each shift the plant was run, a miner would access the area to do cleanup under the tail pulley with a shovel. With continued normal operations, a miner would reasonably likely suffer a foreseeable fatal injury from becoming entangled in the moving machine part.

(Ex. G-8). Inspector Peck determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to result in a fatal accident. Further, he determined that the violation was significant and substantial ("S&S") and that one person would be affected. In addition, he found that the violation was the result of moderate negligence on the part of the operator.

Section 56.14107(a) provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." The Secretary proposes a penalty of $1,795.00 for this citation.

A. <u>Background and Summary of Testimony</u>

Inspector Peck testified that he issued the subject citation because there was an opening at the back of the tail pulley area that exposed the moving machine parts. (Tr. 14). He took a photograph of the alleged violation that shows the subject opening. (Ex. G-1). The photograph shows that the pulley was a fluted, self-cleaning pulley. Peck testified that there is a greater chance of someone becoming entangled when a pulley is fluted. (Tr. 20). He determined that, if a miner were to become entangled in the tail pulley, it is likely that he would suffer a fatal injury. (Tr. 18). He based this conclusion on the size of the opening. He felt that there was "a potential for the whole person to be pulled in and then suffer serious injury, possibly amputation, serious entanglement." *Id.* The cause of death could be "blunt force trauma, loss of a limb, shock, loss of blood." (Tr. 19). He based this conclusion on his MSHA training and on information about similar accidents. (Ex. G-9). A miner could also suffer a wide range of non-fatal injuries that are permanently disabling. (Tr. 21-24).

Inspector Peck testified that an injury was reasonably likely. Miners used a short D-handled shovel to clean up accumulations under and around the tail pulley. The area was shoveled while the belt was operating. (Tr. 25). The inspector testified that Lee Yager told him that the area was cleaned up while the belt was running because he did not want to shut the plant down. *Id.* Yager's statement was a factor in the inspector's S&S determination. (Tr. 25-26). The operator terminated the violation by installing a guard over the opening. (Tr. 27; Ex. G-2). The photo of the terminated tail pulley shows a shovel handle sticking out. The shovel was placed in that location to facilitate cleaning up accumulations around the tail pulley. The photos

taken by the inspector show that the area around the tail pulley was easily accessible to miners. (Ex. G-3 and G-4).

Inspector Peck determined that the operator's negligence was moderate, in part because he was told that the guarding for the tail pulley had been in the same condition for many years and it had never been cited before. (Tr. 31). The violation was obvious, however. *Id.*

Inspector Daniel Scherer also testified for the Secretary. He inspected the Gravel Pit Mine on June 2, 2009. (Tr. 35). He testified that he issued about ten citations during his inspection including citations for inadequate berms and inadequate guards. One of the berm citations was on a roadway that passed by the tail pulley that was cited in the present case. (Ex. G-5 and G-6). Rick Yager, who was responsible for the day-to-day operation of the crusher, was with Inspector Scherer when he issued the berm citation. (Tr. 44). The photo that the inspector took shows that the tail pulley was guarded in the same manner as it was on August 17, 2010, when Peck inspected the crusher. (Ex. G-5). Inspector Scherer did not consider the tail pulley to be adequately guarded on June 2, 2009, but he did not issue a citation. Rick Yager advised the inspector that accumulations were cleaned up with a loader and that there was no foot traffic in that area. (Tr. 46). Scherer testified that, in response, he told Yager that the inadequate guarding on the tail pulley violated section 56.14107(a), but that he was "giving him compliance" because of the location of the screening plant at that time. *Id.* Inspector Scherer believed that the presence of the elevated roadway and the berm that was required to be constructed immediately adjacent to the back of the tail pulley would make it difficult for anyone to become entangled in the tail pulley. (Tr. 46-47, 55; Ex. G-5). Scherer believed that Rick Yager understood what he was telling him, but Yager would often walk away when he was trying to tell him something. This particular MSHA inspection was rather heated because Scherer withdrew a miner for not being properly trained. The next regular safety and health inspection MSHA conducted was the one conducted by Inspector Peck on August 17, 2010. (Tr. 53-54; Ex. G-13).

Lee Yager testified that he has been operating the subject gravel pit for about 20 years. (Tr. 59). He has worked in and around sand and gravel operations since he was 16 years old. He testified that he does not understand why Inspector Scherer did not issue a citation on June 2, 2009, if the lack of a guard at the back of the tail pulley could cause a fatal injury. (Tr. 60). If it was a violation on August 17, 2010, it was also a violation on June 2, 2009. Mr. Yager maintains that he received a citation October 16, 1996, on the same tail pulley and he installed the guards that were present on August 17, 2010, to abate the condition. (Tr. 60-61; Ex. GP-1). No MSHA inspector had cited the guard as being inadequate between October 1996 and August 2010. Mr. Yager testified that he is contesting the moderate negligence determination of Inspector Peck. (Tr. 62). He further stated that he will be changing the guards on the tail pulley in order to completely enclose the pulley "so the tailings can drop out the bottom and we get them out the side, which would make it safer, I think." *Id.* He believes, however, that an accident was unlikely. (Tr. 63). On cross-examination, he acknowledged that the crushing plant was typically moved to a different location about once or twice a year. (Tr. 65).

B. The Violation

It is important to recognize that the Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. It is clear that the condition cited by Inspector Peck violated section 56.14107(a) because the tail end of the cited conveyor was not guarded to protect persons from contacting the tail pulley. The violation is therefore affirmed.

C. Significant and Substantial, Gravity and Negligence

An S&S violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the

> contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

As discussed above, I find that Respondent violated the cited mandatory safety standard. Further, I find that a discrete safety hazard contributed to by the violation existed. I also find that it was reasonably likely, assuming continued mining operations, that the hazard contributed to by the violation would have resulted in an injury of a reasonably serious nature. I credit the testimony of Inspector Peck on this issue which establishes the S&S nature of the violation. The evidence clearly establishes that the tail pulley was a fluted, self-cleaning pulley and that miners were shoveling up accumulations while the belt was operating.

I also find that the violation was serious. Inspector Peck determined that the injury that was most reasonably likely was a fatal accident. Although I find that a fatal injury was possible, I find, based on the record, that the most likely injury was a permanently disabling one. It is more likely that someone would be severely injured if he became entangled in the pulley system. A fatal injury was possible, however. *See e.g. Darwin Stratton & Son Inc*., 22 FMSHRC 1265 (Oct. 2000) (ALJ).

At the close of the hearing, the Secretary moved to increase the negligence of the operator to high and to increase the penalty to $2,500.00. (Tr. 67). She based this motion on the fact that Inspector Scherer warned Rick Yager that the tail pulley needed to be guarded at the back. I find that increasing the degree of negligence and increasing the civil penalty is not warranted. Indeed, I find that the negligence of Respondent was low. I credit the testimony of Inspector Scherer concerning the conversation he had with Rick Yager on June 2, 2009. During that conversation, Scherer warned Rick Yager that if the crusher were moved to a different location that was not immediately adjacent to a bermed roadway, the unguarded end of the tail pulley would be in violation of the safety standard. When Inspector Peck inspected the crusher in August 2010, the crusher had been moved and the employees were exposed to the hazard of unguarded moving machine parts. Inspector Scherer admitted, however, that due to the acrimony between MSHA and the operator during his June 2009 inspection, Rick Yager may have walked away during the conversation and may not have understood what he was saying. I credit this testimony and find that it was unlikely that Rick Yager comprehended the importance of that conversation.

Lee Yager credibly testified that the cited guard was installed following an MSHA inspection conducted on October 16, 1996, and that guard was deemed sufficient to terminate the citation that was issued. The guard was not cited as being inadequate until Inspector Peck's

inspection in August 2010. The Secretary argues that the citation Yager is relying on (Citation No. 4653877) was issued for the guard on the tail pulley of the oversize conveyor, which was about four feet above the ground. (Tr. 51, 67-68; Ex. GP-1). She maintains that the cited tail pulley was not the tail pulley cited by Inspector Peck. Mr. Yager testified that his crushing plant does not include an oversize conveyor because oversized material is not a problem for this quarry. (Tr. 68-69). He maintains that the 1996 citation was issued on the same tail pulley as the citation issued by Inspector Peck.

I need not resolve this issue. I find that Lee Yager genuinely and sincerely believed that the existing guard on the cited the tail pulley was safe and was in compliance with the safety standard. He based this conclusion in large part on the fact that the tail pulley had not been cited by any MSHA inspector since at least October 16, 1996. I find that Respondent's negligence was low.

D. <u>Size of the Operator.</u>

I find that Respondent is a very small, intermittent operator. Information about Respondent at MSHA's website indicates that in 2010, Respondent employed three people who worked a total of 3,489 hours. In 2011, the mine also employed three individuals who worked a total of 3,704 hours.

II . APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The record shows that Respondent had ten paid violations at this facility during 15 months preceding August 17, 2010. (Ex. G-10). Five of these violations were S&S. The total penalty paid for the ten violations was $1,180.00. Respondent is a very small operator. The penalty assessed in this decision will not affect the operator's ability to continue in business. The violation was abated in good faith. My gravity, negligence, and size findings are set forth above. Based on the penalty criteria, I find that a penalty of $500.00 is appropriate for this violation. My reduction of the penalty from that proposed by the Secretary is primarily based on my consideration of the negligence of the operator and my consideration of the appropriateness of the penalty to the size of the business of the operator.

III. ORDER

For the reasons set forth above, Citation No. 6588043 is **MODIFIED** to reduce the negligence of the operator to low. Albert Lee Yager doing business as Gravel Pit Company is **ORDERED TO PAY** the Secretary of Labor the sum of $500.00 within 30 days of the date of this decision.[1]

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

Distribution:

Pamela F. Mucklow, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202-5708 (Certified Mail)

Albert Lee Yager, Owner, Gravel Pit Company 612 SW 10th Street, Madison, SD 57042 (Certified Mail)

RWM

[1]Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5266/FAX 303-844-5268

January 18, 2012

MACH MINING, LLC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. LAKE 2009-395-R
v.	:	Order No. 8414238; 03/13/2009
	:	
	:	Docket No. LAKE 2009-425-R
SECRETARY OF LABOR	:	Order No. 8414249; 03/18/2009
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mach #1 Mine
Respondent	:	Mine ID No. 11-03141
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-495
Petitioner,	:	A.C. No. 11-03141-183828
	:	
v.	:	
	:	
MACH MINING, LLC,	:	
Respondent.	:	Mach #1 Mine

DECISION

Appearances: Edward V. Hartman, Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner.
Daniel W. Wolff, Crowell & Moring, LLP, Washington, DC, for Respondent.

Before: Judge Manning

These cases are before me on two notices of contest filed by Mach Mining, LLC, ("Mach") and a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Mach pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The cases involve two orders issued at the mine in March of 2009. The parties introduced testimony and documentary evidence at a hearing held in St. Louis, Missouri, and filed post-hearing briefs. Mach operates the Mach #1 Mine (the "mine"), a large underground coal mine in Williamson County, Illinois. The mine extracts coal in panels using a longwall system.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Inspector Bobby Jones has been employed by MSHA for almost four years. He currently works as a coal mine inspector out of the agency's Benton, Illinois field office. Prior to joining MSHA, Jones worked for 28 years in the mining industry and held various positions, including laborer, equipment operator, supervisor, section foreman, and shift foreman.

A. Order No. 8414238; LAKE 2009-395-R and LAKE 2009-495

On March 13, 2009, Inspector Bobby Jones issued Order No. 8414238 under section 104(d)(1) of the Mine Act for an alleged violation of 30 C.F.R. § 75.370(d). Order No. 8414238 alleges the following:

> A proposed ventilation plan dated February 25, 2009 was implemented before it was approved by the district manager. The mine operator has mined over 1000 feet inby the location of the proposed set up rooms in headgate No. 3. The drawing titled "Ventilation Plan Map for future Longwall Operations" dated March 19th, 2006, which is part of [the] currently approved ventilation plan for this mine approved, on March 18, 2008, shows a six panel design with all six panels approximately 18,000 feet deep without any stair steps.
>
> The proposed ventilation plan addendum, panel 3 extension, was received by the MSHA District Manager on February 26, 2009. An acknowledgment letter dated February 26, 2009 was sent to the mine operator stating that approval by the district manager was required. The mine operator had been put on specific notice in several meetings and by other letters of this requirement.

Jones determined that an injury was unlikely but, if an injury did occur, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not of a significant and substantial ("S&S") nature, that eleven persons would be affected, and that the violation was the result of high negligence on the part of the operator. The order was designated as an unwarrantable failure to comply with the mandatory standard. The Secretary has proposed a penalty of $2,161.00 for this violation.

On May 15, 2009, I issued an order in LAKE 2009-395-R denying Mach's motion for summary decision. In that order, I granted the Secretary's motion for summary decision and found that the Secretary had established a violation of the cited standard; however, I reserved judgment on the issue of negligence and the appropriateness of the Secretary's designation of this violation as an unwarrantable failure to comply with the mandatory standard. 31 FMSHRC

709 (May 2009).[1] Consequently, I only address the negligence and unwarrantable failure issues with respect to Order No. 8414238 in this decision.

1. *Stipulations*

The parties entered into the following key stipulations with respect to this order:

5. Mach began underground mining at the Mach No. 1 Mine in November 2006.

6. Order No. 8414238 was issued to Mach on March 13, 2009, pursuant to section 104(d) of the Federal Mine Safety and Health Act of 1977.

7. As of the issuance date of Order No. 8414238, the method by which Mach was required to mine and ventilate its gate entries at the Mach No. 1 Mine under the mine's MSHA-approved ventilation plan had not changed from the method described and/or illustrated in the mine's ventilation plan approved by MSHA on March 18, 2008.

8. MSHA Inspector Bobby Jones was aware of, or had access to, the miners, mine records, and other information concerning the status of Mach's development in Headgate No. 3 from February 21 through March 13, 2009.

9. Mach did not take any action preventing Inspector Jones from observing or becoming aware of the status of Mach's development of Headgate No. 3 from February 21 through March 13, 2009.

10. Mine Inspector Jones was aware that Mach began mining inby the location of the proposed setup room in Headgate No. 3 at least 7-10 days prior to the issuance of Order No. 8414238.

2. *Summary of Relevant Testimony*

Inspector Jones testified that before he conducts an inspection he looks at the mine's maps. (Tr. 15). According to Jones, the mine had an approved mine map that reflected panels that were 18,000 feet long. (Tr. 16). While at the mine on January 15, 2009, however, Jones looked at one of the mine's maps posted on a board and noticed that the map included projections that reflected panels longer than 18,000 feet. *Id.* The map showed projections going

[1] At hearing, Mach once again raised the issue of the fact of violation. As I already addressed the fact of violation in my order of May 15, 2009 and in my order of June 29, 2009, denying Mach's motion for reconsideration, I have not revisited this issue in this decision. My orders of May 15 and June 29 are hereby incorporated into this decision by reference.

beyond the existing line of setup rooms. At that particular time, the mine had not gone past the setup rooms and was still over 1,000 feet away from the 18,000 foot mark in Headgate No. 3. (Tr. 16-17). That same day, Jones had a conversation with Mike Skelton, the shift manager. Jones informed Skelton that the "mine file did not show a stair step or an extension of a panel, [and] that [Mach] would have to get approval from the district manager to change their ventilation system." (Tr. 17-18). Jones had a similar conversation with Chris England, also a shift manager. (Tr. 18). Moreover, Jones testified that he believed that his own supervisor contacted Anthony Webb, general manger of the mine, the very next day and told him that district manger approval was required. (Tr. 19).

In early March of 2009, while at the mine, Jones noticed that the same mine map now reflected that the mine had proceeded inby more than 18,000 feet in the No. 3 Headgate entries. (Tr. 20). Jones did not recall whether he traveled to the subject area of the mine that day. (Tr. 21-22). At some point during the days following this observation, Jones contacted Danny Ramsey, the ventilation specialist in his office, who showed Jones emails between him and Mark Eslinger, the district's ventilation supervisor. (Tr. 22, 44). Jones did not talk to Bob Phillips, the district manager for District 8, about this issue. (Tr. 42). After confirming that no change to the ventilation plan had been approved which would have allowed the mine to proceed beyond the 18,000 foot threshold, Jones traveled to the mine on March 13, 2009, to conduct a regular EO1 inspection and issued the subject order. (Tr. 20, 22-2, 454). Jones testified he believed that, based on conversations with Chris England, Mike Skelton, and others at the mine, it was the mine's intention to develop the panel to 36,000 feet without first getting approval from MSHA. (Tr. 23, 44, 45). At hearing, Jones conceded that he had little knowledge of any conversations Mach's managers may have had with MSHA officials about Mach's plan to go beyond the 18,000 foot threshold in Headgate No. 3. (Tr. 46, 47).

Jones testified that he had conversations with mine managers about the alleged poor quality of the roof in the area where the panels had been approved to end, i.e., at 18,000 feet, but he never offered any alternatives to the approved plan since he had worked at a mine that had similar roof conditions where there was no need for an alternative. (Tr. 20-21). According to Jones, the mine mentioned a number of different reasons for mining past the approved plan, including mining an additional 1,000 feet due to the mine roof stresses in the area, and as far 36,000 feet to get into limestone. (Tr. 18-19). Jones was aware of a third party engineering firm's recommendation to mine 1,000 feet past the approved plan in order to get into better roof. (Tr. 21). While Jones was concerned that mining past the 18,000 foot threshold would require the mine to alter its bleeder system, he agreed that, as of March 13, 2009, the mine had not affected the bleeder system by anything it had done on the Headgate No. 3 development section. (Tr. 45). The No. 3 Headgate entries were a dead end at that time and were not tied into the bleeders for the Nos. 1 and 2 Headgate entries.

Jones determined that Mach exhibited high negligence and that the violation was the result of its unwarrantable failure to comply with the mandatory standard. (Tr. 23). He agreed that he did not confer with anyone else at MSHA about his high negligence and unwarrantable failure determinations. (Tr. 43, 56). Rather, he testified that he based his findings on his 30

years of mining experience, and on conversations with mine personnel. Jones had previously told mine management that a modification of the ventilation plan was required before the headgate entries could be extended beyond 18,000 feet and he made the company aware that it was his job to let them know that an approved plan was required. Jones testified that he was aware that three management officials, i.e., Webb, England, and Skelton, knew that the mine was mining past the approved plan. (Tr. 25). Jones testified that the mine was aware that it needed an approved plan, and that any change to the ventilation system required district manager approval. (Tr. 24). According to Jones, the mine exhibited aggravated conduct constituting more than ordinary negligence when it chose to continue mining "after being warned, or put on notice that . . . plan approval was required." (Tr. 25). Jones testified that the violative condition was obvious. (Tr. 25). Jones found that the violation did not rise to the level of S&S or amount to an imminent danger. (Tr. 24-25). At no point during the issuance of the subject order did Jones ever have any dealings with district manager Phillips, and neither Ramsey nor Eslinger took part in any determination of whether to issue the violation as high negligence or unwarrantable failure. (Tr. 42-44). Jones acknowledged that reasonable people could disagree as to whether this alleged violation should have been issued as a 104(a) or 104(d). (Tr. 49). Further, he agreed that Mach believed that it was not violating the law. (Tr. 49-50).

Anthony Webb testified for Mach. Webb is the general manager at the mine and is responsible for everything that goes on both underground and on the surface. (Tr. 72). Prior to becoming general manager in June of 2009, Webb was the Mine Superintendent. (Tr. 72, 108-109). Webb has a bachelor's degree in mining minerals engineering and foreman papers for West Virginia. (Tr. 73.) He began work in the coal industry in 1999. (Tr. 73). In 2005 he started working for Mach as a shift manager and had involvement in the design and development of the mine plans, including the ventilation plans. (Tr. 78).

Webb testified that in November 2005, Mach began constructing the slope of the mine using conventional mining methods. (Tr. 75-76). In 2006, Mach intersected the coal seam, which was approximately 500 feet deep. (Tr. 76). In November of that year, Mach began bottom development and in the first quarter of 2007 it started driving the first longwall panel. (Tr. 76). The first panel was 18,000 feet in length and 1,250 feet in width. (Tr. 76). Mach began longwall mining Panel No. 1 in March of 2008. (Tr. 76). Since that time, the mine has completed two panels and, at the time of hearing, was almost done with Panel No. 3. (Tr. 76).

Webb explained that the mine is ventilated by a push-pull system, with a fan that pushes air into the mine and an exhausting fan that pulls air out of the mine. (Tr. 76). Webb testified that the mine had two different types of ventilation plans, one for the development sections and other plans specific to each longwall panel. (Tr. 87). Webb explained that, with regard to the actual longwall mining, District 8 was approving a separate plan for each panel, while the development plan was one continuous plan. (Tr. 86-87). Webb stated that the development of the headgates was included in the original development section ventilation plan that the mine had been using since its approval during the development of the slope. (Tr. 88).

According to Webb, the mine was using a ventilation system that was different from the other mines in District 8. When the mine was first being developed, Mark Eslinger told Webb that he wanted to see a proposed map of the mine to give him an idea of how Mach was going to design the mine. (Tr. 78-79). Eslinger told Webb that he wanted the information early in the process so that he could become comfortable with the system. (Tr. 79). In response, Mach provided the March 19, 2006, ventilation plan map that was referenced in the subject order and was used during the construction of the slope. (Tr. 78; Ex. A Order of May 15, 2009). According to Webb, the mine did not consider the map to be part of the ventilation plan and submitted it as a courtesy because Eslinger had asked for it. (Tr. 79). Webb testified that the map showed six panels, approximately 18,000 feet in length, situated in a rectangular fashion. (Tr. 79-80).

Webb explained that in the Illinois coal basin the geology is such that there is horizontal stress which can cause less than ideal roof conditions when the entries are directly perpendicular to the stress. (Tr. 83-34). The roof conditions in the setup entries that became the bleeders for the Nos. 1 and 2 panels were poor because of this stress. (Tr. 84-89). As a result, mine management talked to an outside engineering firm, Keystone Mining Services ("Keystone"), who conducted a roof control analysis and created a number of models for different scenarios as to how the mine could deal with the horizontal stress on Panel No. 3. (Tr. 92; Ex. R-4). Two scenarios Keystone evaluated were extending the panel to 19,000 feet or shortening it to 17,000 feet. (Tr. 92-93).

According to Webb, MSHA wanted the bleeders to be walked by the examiners so that they could look for mud, water, roof falls, or other adverse conditions. (Tr. 91). Because MSHA was pushing the mine to walk the bleeder entries, the mine felt that the only way it could do so safely was if they had a more reliable roof. (Tr. 90-91). In southern Illinois, limestone is the best roof that a mine can hope for. (Tr. 90). Extending the panel into limestone would improve the safety and health of both the miners that were developing the entries and the examiners that would eventually be walking the entries. (Tr. 102). Webb opined that, when an operator can keep miners from being exposed to bad roof, it should do so. (Tr. 102).

Webb testified that Mach provided MSHA with a copy of the Keystone report on February 10, 2009, at a meeting in the Vincennes office where Bob Phillips, Kevin Stricklin, and Mary Jo Bishop were all present. (Tr. 94, 97, 135). Inspector Jones was not present at this meeting. Webb explained that Mach personnel reviewed the report with MSHA personnel and answered questions. (Tr. 95). During the meeting, Mach informed MSHA of its intent to extend Panel No. 3 to 19,000 feet to get the bleeder entries out of the area where horizontal stress had been identified on Panel Nos. 1 and 2. (Tr. 96, 135). Webb testified that any reference to "36,000 feet" was about Panel No. 4 and that the mine had learned that Panel No. 4 would need to be that long to get into a limestone area with good roof. (Tr. 93). Webb agreed that, as of February 10, 2009, he was not aware of any obligation to seek district manager approval for this change. District Manager Phillips did not say that an amended ventilation plan needed to be submitted or that the mine could not proceed until such approval was obtained. (Tr. 97, 109).

After Mach decided to extend Panel No. 3 an additional 1,000 feet inby to 19,000 feet, Keystone generated a second, more detailed report on February 23, 2009, that showed that the bleeder entries for Panel No. 3, if the panel were extended to 19,000 feet, would be in an area with a much lower stress level and, in turn, would have safer roof conditions. (Tr. 101-102; Ex. R-6). The bleeder entries under this plan would have a stair step configuration. At a meeting on February 24, 2009 in Vincennes, Mach provided MSHA with a copy of the February 23, 2009, Keystone report. (Tr. 96, 102). Webb testified that he and District Manager Phillips were at the meeting and he thinks that Mary Jo Bishop, Mike Renni and Mark Eslinger were there. (Tr. 102-104). According to Webb, Eslinger was the ventilation supervisor in the Vincennes, office, while Renni was the Benton, Illinois, field office supervisor. (Tr. 103). During the meeting, Mach informed the MSHA personnel that the mine had gone past the 18,000 foot mark and that it planned to go all the way to the limestone, then back up to the 19,000 foot mark and cut the bleeder entries for Panel No. 3 at that point. (Tr. 103). According to Webb, at the end of the meeting Phillips told Webb and the former general manager of the mine, Richard "Pete" Hendrick, that "it shouldn't be a problem." (Tr. 104). Phillips requested a map of the new stair step design of the bleeder entries, but did not say anything about approval being needed to develop beyond the 18,000 foot mark in Headgate No. 3. (Tr. 96, 103, 104). Mach provided the requested map to MSHA and Phillips on the February 25, 2009. (Tr. 96, 104; Ex. R- 7). Webb testified that he did not believe that the map he submitted was part of a plan but thought it was a courtesy to Phillips. (Tr. 105, 136). He explained that, if it had been a plan submittal, the cover letter would have been different. (Tr. 105). Webb agreed that a February 26, 2009 letter from Bob Phillips to him was in response to the map that Mach had provided to MSHA on February 25th, and that the letter stated that "[a]pproval by the District Manager is required and, action is being started to determine that this plan meets criteria for approval." (Tr. 138); Ex. PE-7. Webb understood the letter to mean that approval was needed before the mine connected Headgate No. 3 into the Headgate No. 2 bleeder system. (Tr. 139, 156).

Webb testified that Inspector Jones was the regular inspector at the mine around this time. (Tr. 97). Webb acknowledged that the first time the mine went past the 18,000 foot threshold in Headgate No. 3 was on February 21, 2009. (Tr. 97). He testified that Jones was at the mine on February 23, 2009 and traveled to Headgate No. 3 for the first time on February 24, 2009. (Tr. 98-99). Webb stated that Jones did not mention anything as far as needing any kind of approval when Jones was at the face of Headgate No. 3 on the 24th. (Tr. 99).

Webb agreed that MSHA District 8 required additional approval every time a new longwall panel was mined. (Tr. 99). Further, he agreed that, as of March 13, 2009, the mine could not complete development of Panel No. 3 and begin longwall mining without additional approval. (Tr. 99-100). He knew that additional approval was necessary before the mine could connect the No. 3 Headgate entry to the active bleeder system for Panel Nos. 1 and 2. (Tr. 100, 155). However, it was his understanding that developing the headgate beyond the threshold was never something that had been regulated and required approval. (Tr. 88, 155). According to Webb, the mine had taken none of the steps that would have required additional approval. (Tr. 101).

Webb testified that the mine had been developing Headgate No. 3, but as a result of the subject March 13, 2009 order, the mine had stopped development. (Tr. 82). Webb explained that, while Panel No. 1 had been 18,000 feet in length, Panel No. 2 was actually 18,200 feet, i.e., longer than Panel No. 1. (Tr. 82, 106; Ex. R-2). The extended development of Panel No. 2 was done to "gain access to the bleeder entries behind" Panel No. 1. (Tr. 82). He further explained that, at the time, the mine was not required to physically walk the bleeders in Panel No. 1. (Tr. 82). When the mine began Panel No. 2, MSHA asked if the mine could drive new entries because the entries behind Panel No. 1 were deteriorating. (Tr. 82-83). As a result, the mine started to drive two new entries, but, due to the roof conditions behind Panel No. 2, the mine abandoned the plan. (Tr. 83). According to Webb, the mine told MSHA about this and MSHA was aware that the mine had gone a bit further than 18,000 feet with Panel No. 2. (Tr. 83, 106). Mach never received a citation or order for going beyond 18,000 feet with Panel No. 2. (Tr. 83, 106). In March or April of 2010, MSHA approved the stair step design for the bleeders and Mach began mining Panel No. 3. (Tr. 122).

Webb testified that Mike Skelton was the shift manager at the mine in February and March of 2009. (Tr. 106-107). Webb talks to Skelton on a daily basis and Skelton never told Webb that Bob Phillips or any acting district manager was requiring plan submission and approval for the mine to go beyond 18,000 feet in Headgate No. 3. (Tr. 107-108).

On cross-examination Webb testified that the February 4, 2009, letter from Mary Jo Bishop to him did not put the mine on notice that approval was needed before the mine went past the 18,000 foot mark in Headgate No. 3. (Tr. 132; Ex. PE-4). Moreover, Bishop was at the February 10, 2009, meeting in Vincennes, discussed above, and Webb knows that the letter was discussed, yet no one from MSHA made any mention about plan submission or approval being required to go past 18,000 feet. (Tr. 132). Webb agreed that the stair step would have to be approved before cutting into the bleeder system. (Tr. 134)

3. *Parties' Arguments*

i. Secretary of Labor

The Secretary argues that Mach's violation of section 75.370(d) "clearly meets the standard for unwarrantable failure to comply with [the] mandatory standard." Sec'y Br. 8. Specifically, the Secretary asserts that Mach engaged in "aggravated" conduct as evidenced by the presence of three aggravating factors. *Id.*

First, Mach had knowledge of the existence of the violation. Mach's assertion that it did not know of the requirement to get district approval or, in the alternative, that it had already obtained approval, before mining the additional 1000 feet, is not supported by the evidence. *Id.* Inspector Jones had multiple conversations Mach officials regarding the need to obtain district approval and Webb's testimony that the mine had not been told about the need to obtain approval is contradicted by a February 4, 2009, letter from MSHA to the mine. *Id;* Ex. PE-4. Moreover, any approval that Mach alleges having been given is contradicted by three letters,

dated February 26, 2009, March 13, 2009, and March 18, 2009, in which the district manager never approved Mach's projected plan. *Id;* Ex. PE 7, PE-16 & PE-17. In spite of the fact that Mach was provided with clear notice that district manager approval was necessary before Mach mined beyond the approved plan, the mine intentionally and knowingly proceeded without such approval. Sec'y Br. at 9.

Second, the Secretary asserts that the violation was obvious. Mach's approved ventilation plan was a six panel design, with each panel stretching to 18,000 feet. *Id.* Inspector Jones was made aware of the mine's decision to mine past the 18,000 foot mark on January 15, 2009, when he viewed the mine's map. *Id.* The subject order was issued on March 13, 2009. Roughly a week and a half before issuing the order, Jones saw on a map that Mach had already gone past the 18,000 foot mark. *Id.* Mach management was aware that mining operations had extended beyond the approved map. *Id.* Despite verbal and written warnings that district approval was necessary, "Mach simply ignored the notice and willfully chose to proceed with its plan anyway." *Id.*

Third, the violation had existed for at least seven to ten days. Mach stipulated that Inspector Jones was aware that Mach began mining inby the proposed setup room in headgate No. 3 at least seven to ten days prior the issuance of the subject order. *Id.* at 9-10. By the time Jones issued the order, the mine had advanced approximately 1,000 feet. *Id.* at 10. As such, "Mach's violative conduct was knowingly being continued for approximately 7-10 days." *Id.*

ii. Mach Mining

Mach argues that it "had a genuine, good-faith belief in the legality of its actions, and did not exhibit the type of 'knowing' or 'aggravated conduct' that constitutes an unwarrantable failure to comply with [the] mandatory standard" and that it did not act with high negligence. Mach Br. 15. Mach asserts that this case presents an issue of "first impression involving a legitimate dispute over the interpretation of the Secretary's ventilation plan standard" and that "there is no evidence to suggest that Mach was acting with indifference or a lack of reasonable care." *Id.* at 16. The Secretary failed to present evidence that Mach's view of the situation "was not well-intentioned and genuine." *Id.* Moreover, Inspector Jones' own testimony conceded that "he did not think Mach subjectively thought it was violating the law, . . . and he agreed that another inspector might well have written the paper as a § 104(a) citation." *Id.*

Mach points out that it had not been cited on Panel No. 2 when it mined approximately 200 feet past the 18,000 foot projection and it argues that the mine had fully informed the Secretary of its intention to mine beyond the 18,000 foot projection on Panel No. 3. *Id.* at 16-17. Mach's action of developing Panel No. 3 beyond the 18,000 foot mark was based upon the recommendation of an outside engineering group that suggested that further development would help to avoid the poor roof conditions that the mine had experienced in the setup entries of Panel Nos. 1 and 2. *Id.* at 17. Despite providing the Secretary, multiple times, with notice of its intent to mine beyond the 18,000 foot mark, no one at MSHA ever told Mach that it could not proceed as planned and, instead, MSHA only asked for an "updated map (or projection)." *Id.* Further,

Mach also notified MSHA after it had mined past the 18,000 foot mark in Headgate No. 3, yet no one at MSHA mentioned anything about the need to obtain district manager approval. *Id.* Rather, District Manager Phillips simply requested a depiction of what Mach was doing at the time. *Id.* That depiction was provided the following day. *Id.*

Mach argues that Inspector Jones' testimony is of little value, while Webb's testimony substantiates the information set forth in Hendrick's supplemental declaration. *Id.*; *see* Hendrick Declaration related my order of May 15, 2009. According to Mach,"this Court, in denying the Secretary's motion for summary decision on the issue of unwarrantable failure, stated that if the assertions stated in the Hendrick supplemental declaration were true, it would be 'unlikely' the Court would uphold the unwarrantable failure allegation." *Id.* (citing May 15th Order at 7). Mach argues that the Secretary has known for over one and one half years prior to hearing "exactly what Mach's position in opposition to the unwarrantable failure allegation was" and, despite it making its intentions known to MSHA at a number of meetings with MSHA officials, the Secretary has only called one witness "who has no knowledge, personal or even indirect, about the primary subject matter of [Hendrick's] declaration," i.e., what was made known to MSHA at the subject meetings regarding Mach's planned development of Panel No. 3 to 19,000 feet. *Id.* at 18. Based on such, Mach argues that Webb's testimony is compelling given that the Secretary called no witnesses to rebut Webb's testimony as to the "truth and accuracy of Mach's characterization of what was said (and not said) in those meetings." *Id.*

Further, Mach argues that the February 4, 2009, letter from District Manager Phillips to Mach can be "reasonably interpreted by Mach to mean nothing than that Mach was required to obtain MSHA approval (1) prior to mining through from Panel 3 into the Panel Nos. 1 and 2 bleeder ventilation current; and (2) prior to commencing longwall mining on Panel 3." *Id.* at 20. Finally, Mach argues that the February 26, 2009, letter from Phillips to Mach was nothing more than a reminder that Mach did not yet have ventilation plan approval for longwall mining Panel No. 3. Mach Br. at 21; Ex. PE-7.

4. *Unwarrantable Failure and Negligence*

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission restated the law applicable to determining whether a violation is the result of an unwarrantable failure:

> The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also*

Buck Creek Coal, Inc. v. FMSHRC, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

> Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

I find that, for the reasons set forth below, Mach did not engage in aggravated conduct constituting more than ordinary negligence and that the violation was improperly designated as an unwarrantable failure to comply with the mandatory standard. At the outset of this discussion it is important to note that I found both Inspector Jones and Mr. Webb to be credible witnesses. Based on the credible testimony of both witnesses, I find that the parties were not on the same page when discussing what was necessary for Mach to comply with the cited standard. As a result, Mach unintentionally failed to obtain approval before proceeding beyond the 18,000 foot mark in Headgate No. 3, thereby violating the standard.

Two of the potential aggravating factors that must be addressed in an unwarrantable failure analysis are "whether the operator has been placed on notice that greater efforts are necessary for compliance" and "the operator's knowledge of the existence of the violation." While the Secretary argues that she clearly put the mine on notice of its responsibility to obtain approval before mining beyond 18,000 feet in Headgate No. 3, Mach argues that it had a good faith belief that it was not violating the cited standard when it proceeded to develop Headgate

No. 3 beyond the 18,000 foot mark. I credit the testimony of Webb, who explained that Mach believed that approval was only needed before connecting to the bleeder systems of Panel Nos. 1 and 2 and before beginning longwall mining of Panel No. 3. In crediting his testimony, I note that the Secretary alleges that a letter sent by MSHA to Mach and the statements of MSHA personnel to Mach personnel, put mine management on notice of the requirement to obtain approval before proceeding inby the 18,000 foot mark in Headgate No. 3. However, the evidence is not as clear and convincing as the Secretary represents.

There were statements made by officials in face-to-face meetings and in written correspondence from MSHA regarding the need to obtain approval before extending Panel No. 3 beyond the 18,000 foot mark. However, Mach reasonably and in good faith believed that such statements were made with respect to the need to obtain approval before connecting the subject Headgate No. 3 entries to the Panel Nos. 1 and 2 bleeder systems and before mining the subject panel. After all, the February 4, 2009, letter to Webb, states that "[f]ailure to obtain approval before making changes to the bleeder design could be cause for enforcement action to be taken." (Ex. PE-4). Inspector Jones admitted that nothing that the mine had done as of the date of issuance of the order had affected the bleeder system. I find Webb's interpretation of the February 4, 2009, letter and his interpretation of what he was told by MSHA personnel, to be reasonable in the context of this unwarrantable failure analysis. Moreover, the fact that Mach, without incident, proceeded to develop beyond the approved 18,000 foot threshold in Panel No. 2 lends credence to Webb's claim as to what the mine believed it was allowed to do. Mach's belief, while mistaken, explains the mine's view that it had no knowledge of the existence of the violation and, likewise, that it was not on notice that greater efforts were needed for compliance. I agree with Mach and I find these two factors to weigh in its favor.

It is undisputed that Mach proceeded beyond the 18,000 foot mark in Headgate No. 3. I have already found that, in doing so, Mach violated the cited standard. I credit Webb's testimony that the mine first advanced beyond the 18,000 foot mark in Headgate No. 3 on February 21, 2009. The subject order was issued on March 13, 2009, with the result that the violative condition existed for approximately twenty days. While the condition existed for that period of time, Mach's Inspector log shows that Inspector Jones was at Headgate No. 3 on February 24th. (Ex. R-5). Further, Inspector Jones himself admitted that some time passed between the time he claims to have first noticed the violation, i.e., "early" March, and the time he issued the order, i.e., March 13th. As a result, given my finding that the mine had a good faith belief that it was not in violation of the cited standard, the length of time that the condition existed is not helpful in establishing whether the violation was the result of the mine's unwarrantable failure to comply with the mandatory standard.

With regard to the obviousness of the violation, I agree with the Secretary that the cited "condition" was obvious. However, when looked at in the context of my above finding regarding the mine's good faith belief that it was in compliance with its ventilation plan, I find that the "violation" was not obvious.

Inspector Jones issued the subject order as non-S&S and unlikely to result in an injury. If an injury did occur, he determined it would result in lost workdays or restricted duty. There is no evidence in the record to demonstrate that the condition created by this particular violation posed a danger to miners. The No. 3 headgate entries were being ventilated in accordance with the mine's approved ventilation plan as these entries were developed. Once the subject order was issued, the mine ceased mining these entries. While not of consequence to this analysis, I do note that, per the undisputed testimony of Webb, the changes made to the ventilation system and panel design that are the subject of this order were approved by MSHA in early 2010. (Tr. 122).

Based on my above findings, I agree with Mach that it had a legitimate, good faith, albeit incorrect, belief that mining beyond the 18,000 foot mark in Headgate No. 3 was not in violation of the mandatory standard. It boils down to a question of when MSHA's approval was required, at the time the entries were driven beyond 18,000 feet or at the time these entries were connected into the existing bleeder system. Given the facts presented, and in consideration of the potential aggravating factors discussed above, I hold that Mach's actions did not demonstrate aggravated conduct constituting more than ordinary negligence. Its conduct did not rise to the level of "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Rather, the violation seems to be the product of a lack of clear communication between MSHA and Mach which resulted in Mach's misinterpretation of what was required for compliance with the mandatory standard. I find that given this good faith misunderstanding, Mach's negligence was low. Consequently, I **MODIFY** the subject order to a 104(a) citation with low negligence. I affirm the Secretary's low gravity findings. A penalty of $100.00 is appropriate for this violation.

B. Order No. 8414249; LAKE 2009-425-R and LAKE 2009-495

On March 18, 2009, Inspector Bobby Jones issued Order No. 8414249 under section 104(d)(1) of the Mine Act for an alleged violation of 30 C.F.R. § 75.370(d). Order No. 8414249 alleges the following:

> An 18 inch shaft was drilled from the surface into the active bleeder system on March 11, 2009, in the No. 2 entry at No. 190 crosscut in the No. 1 tailgate prior to a plan being submitted and approved by the District Manager. This shaft is to be used to place remote monitoring devices into the bleeder system as an alternative method to determine the effectiveness of the bleeder system.

Jones determined that an injury was unlikely, but, if an injury did occur, it could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S, that ten persons would be affected, and that the violation was the result of high negligence on the part of the operator. The order was designated as an unwarrantable failure to comply with the mandatory standard. A penalty of $2,161.00 was proposed by the Secretary. For the reasons that follow, I **VACATE** the order.

1. *Stipulations*

The parties entered into the following key stipulations with respect to this order:

11. Order No. 841429 was issued to Mach on March 18, 2009, pursuant to Section 104(d) of the Federal Mine Safety and Health Act of 1977.

12. The borehole referenced in order No. 8414259 was not included in the Mach No. 1 Mine ventilation plan of March 18, 2008.

13. Regarding the borehole referenced in order No. 8414259, Mach and District 8 discussed – prior to it being drilled – the use of such a borehole as a potential alternative means of evaluating the effectiveness of the bleeder system by remote monitoring in the event that access to the bleeder evaluation points could not be maintained, but remote monitoring through the referenced borehole was never required or incorporated into Mach's ventilation plan.

2. *Summary of Relevant Testimony*

Inspector Jones testified that, on February 24, 2009, while at the mine conducting an inspection, he had a conversation with Morris Niday, a miners' representative who was a warehouse and surface supervisor at the mine. (Tr. 28). During the conversation, Jones learned that Mach had begun to bore a 18-inch diameter hole from the surface into the mine's bleeder system. (Tr.27-28). Jones traveled to the surface to inspect the hole and, after meeting with his own supervisor and speaking with Jim Slapak, the mine's senior engineer, Jones determined that the hole had not yet penetrated into the bleeder system and was, instead, approximately 10 feet from doing so. (Tr. 28-29). To Jones' recollection, the hole was not marked on any maps at that particular time. (Tr. 29). Jones testified that, based on his training and experience, the mine had not yet committed a violation because the it had not yet changed the ventilation system; however, he informed Slapak that, prior to punching the hole through the roof of the mine, Mach would need to obtain an approved plan that included the borehole. (Tr. 29-30). Jones could not recall if he spoke with Webb on February 24th about the borehole. (Tr. 30). Jones did acknowledge that he was aware that there had been discussions between MSHA and Mach about a borehole but, before February 24, he was not aware that the mine had actually begun drilling the hole. (Tr. 29).

Jones testified that subsequently, on or around March 16, 2009, while conducting an EO1 inspection at the mine, he learned that the mine had completed the hole and punched through into the bleeder system. (Tr. 30). During the inspection that day, he did not travel to the area where the hole had punched through the mine roof. (Tr. 31). That evening, along with Webb, Jones did go to the location where the hole exited the mine on the surface. (Tr. 31). The hole on the surface was uncapped and air was coming out of the mine through the hole. (Tr. 32). According to Jones, Webb stated that the mine had completed the hole and punched through on March 11th. (Tr. 32). Jones testified that he had conversations with Webb on March 16th and

17th during which he learned that, while Webb was not sure exactly when on March 11 the hole had been completed, it was more than likely that miners were underground at the time, and the supervisors were aware that the hole was being drilled. (Tr. 34; Ex. PE-19). According to Jones, there were approximately ten to eleven miners underground in the general area. (Tr. 34). Jones acknowledged that the air readings he took in the area did not show anything out of the ordinary. (Tr. 35).

On March 18, 2009, Jones returned to the mine and issued the subject order. (Tr. 32). He explained that it took him two days after March 16 to issue the order because he wanted to check to see if a more recent ventilation plan that included the borehole had been approved. (Tr. 32). Jones did not find such a plan, but he testified that if one had existed he would not have found a violation. (Tr. 32).

Jones testified that he determined that the borehole was a violation of the mandatory safety standard because it "had the potential to alter the air flow in the bleeder system[,]" but acknowledged that the only evidence that the air current had been altered was the air coming out of the hole on the surface. (Tr. 36, 52). Further, he testified that the bleeder system is part of the air course. (Tr. 54). During cross-examination, Jones had the following exchange with counsel for Mach:

> Q. (Counsel for Mach) You're not aware of any evidence, are you, sir, that when they punched through on March 11th, 2009, that they changed the ventilation system to alter the main air current, or a split of the main air current in a manner that could materially affect the safety and health of the miners? Would you agree that they didn't do that on March 11th, 2009?
>
> A. (Jones) I can't say if they did, or they didn't. The potential was there. I don't know if they did, or not.
>
> . . .
>
> Q. Would you agree with me that you are not aware of the main air current, or any split of the main air current having been altered by their punching through on March 11th, 2009?
>
> A. I have no way of knowing if it had been altered.
>
> Q. But would you agree with me that you don't have any evidence showing that it was altered?
>
> A. I have no evidence showing that it was altered.

Q. And you also don't have any evidence of, would you agree with me, that there was any dangerous or combustible level of methane in the bleeder when they punched through?

A. No, I have no evidence at that time that there was any there.

(Tr. 52-53). To his knowledge, the borehole had never been incorporated into the ventilation plan for purposes of evaluating the effectiveness of the bleeder system. (Tr. 55, 59-60). Jones found that the cited condition was not an imminent danger since it already existed and nothing had gone wrong to that point. (Tr. 36). Jones determined that an injury was "unlikely" given that nothing occurred when Mach holed through into the bleeder. (Tr. 51). Further, he found that the condition was not S&S. (Tr. 36).

Jones issued the violation as a 104(d) order and determined that it was the result of Mach's high negligence and unwarrantable failure to comply with the mandatory standard because both he and the MSHA field office supervisor, Mike Renni, had informed Mach that district manager approval was necessary before the mine drilled through the mine roof. (Tr. 35-37, 51). By failing to obtain such approval, Mach exhibited aggravated conduct constituting more than ordinary negligence. (Tr. 37). Jones opined that the condition was obvious and that, to his knowledge, Slapak, Webb, Chris England, a shift manager, and Mike Skelton, another shift manager, were all aware that the borehole was being drilled and that the drill had punched through the mine roof from the surface. (Tr. 37). Jones agreed that he did not confer with any other MSHA personnel about issuing the order as high negligence or an unwarrantable failure to comply. (Tr. 51, 56). Jones acknowledged that reasonable people could disagree as to whether this alleged violation should have been issued as a 104(a) or 104(d). (Tr. 55). Further, he agreed that Mach believed that it was not violating the law. (Tr. 55-56).

Anthony Webb testified that it takes approximately two weeks to drill a borehole from the surface into the mine. (Tr. 110). The borehole at issue is an 18-inch case hole that was wet-drilled from the surface into the mine. (Tr. 114-115). Wet-drilling kept the hole filled with water so that the drill tailings floated to the top of the hole. (Tr. 114-115). Once the hole was within 10 feet of the mine roof, a casing was installed to prevent the hole from caving in. (Tr. 114-115). The casing was then grouted to prevent water from continually entering the mine via the wall of the hole. (Tr. 114-115). Subsequently, the remaining 10 feet of the borehole were drilled out and a certain amount of water used in the wet-drilling process entered the mine from the column above. (Tr. 115). In this particular case, the 18-inch wide borehole, which was approximately 600 feet deep, reached the bleeder in the mine on March 11, 2009. (Tr. 110-111).

Webb explained that Jim Slapak was in charge of the drilling operation and took care of the surface surveying. (Tr. 116). Webb was not aware of any precautions taken by Slapak during the drilling of the hole besides drilling with water and making sure that there were no miners in the area when the drill punched through into the mine. (Tr. 116). Miners would not

have been any closer than 4,000 feet from the area where the hole punched through. These miners were working at the face on Panel No. 2. (Tr. 117). A spark or ignition during the punch through was very unlikely given the water surrounding the drill bit. (Tr. 118). Even if there were a spark, the area of the punch through was well rock-dusted and the methane readings were " less than one [percent]." (Tr. 118). According to Webb, methane only becomes a problem "between 5 and 15 percent." (Tr. 120).

Around the time that the borehole was punched through, Mach was involved in a dispute with MSHA over whether the bleeders in Panel No. 2 should be walked by the examiners. (Tr. 116-117). The ventilation plan submitted by Mach established bleeder evaluation points that were outby the bleeder entries. (Tr. 125-127). At the insistence of MSHA, the preshift examiners began walking the bleeders. (Tr. 116-117, 141). As a result of that dispute, the general area was being preshifted at the time of the order; however, the specific area of the borehole was not being preshifted because it was not necessary. (Tr. 118-119, 146; Ex. R-8). Prior to the dispute, Webb testified that, during the February 2009 meetings in Vincennes, the same meetings discussed *supra* in the context of Order No. 8414238, there was a discussion between Mach and MSHA about potential alternative means for the mine to evaluate the bleeder system. (Tr. 111). Inspector Jones was not present during the discussions. (Tr. 112, 121). Webb testified that, at the meetings, Mach expressed that it was not safe to have miners walking the bleeders and, in response, MSHA personnel mentioned the possibility of using remote monitoring through boreholes. (Tr. 111). At no point during the meetings did the district manager, or anyone else, say that approval was needed before drilling the borehole into the mine. (Tr. 121, 142). As a result, Mach decided to start drilling the borehole. (Tr. 111). According to Webb, it takes approximately two weeks to drill a borehole from the surface into the mine, so Mach wanted to have the holes in place if it chose to go down the path of remote monitoring. (Tr. 111). Drilling the hole ahead of time would allow the mine to avoid shutting down for two weeks while MSHA decided if it wanted the mine to use remote monitoring. (Tr. 111, 141).

Webb testified that two 12.5 foot diameter bleeder shafts were located less than 200 feet from where the borehole entered the mine. (Tr. 113-114). The air flows from the active longwall face toward the bleeders. (Tr. 117-118). Further, the borehole was never actually used for the purpose of evaluating the effectiveness of the bleeder system and was never incorporated into the ventilation plan. (Tr. 112). Webb agreed that, had the mine used the hole for purposes of evaluating the effectiveness of the bleeder system, then it would have needed to obtain approval before doing so. (Tr. 158-159). According to Webb, the addition of the borehole did not alter the main air current in a manner that would have affected the safety and health of miners. (Tr. 113). He based this determination on his "engineering background and common sense . . . that an 18-inch borehole that is less than 200 feet from two 12-and-a-half foot holes, with a bleeder fan on top of them, that's sucking like crazy, is not going to materially affect the ventilation" and the fact that the mine had no measurements to indicate that the current had been altered. (Tr. 113-114). Moreover, according to Webb, the borehole did not affect any of the requirements of section 75.371. (Tr. 112-113).

3. *Parties' Arguments*

i. Secretary of Labor

The Secretary argues that Mach violated section 75.370(d) when it drilled a borehole into its bleeder system without first obtaining the written approval of the district manager. Sec'y Br. 11-12. Mach not only failed to argue that the borehole did not create any change in the information required by section 75.371, the mine actually admits that, "'had it incorporated this borehole into its ventilation plan, it would have been required to obtain district manager approval in advance." Sec'y Br. 12 (citing Mach Statement). Mach cannot admit that, on one hand, had the borehole become necessary, it would have required MSHA approval, while on the other, had the borehole not been necessary, it would be "free to drill at will." Sec'y Br. 13. The borehole, whether used or not, was "a proposed method of enabling monitoring of the bleeder system and thus, its inclusion into the plan would be required by [30] C.F.R. § 75.371." *Id.* The Secretary argues that the Mine Act "is to be liberally construed in light of the prime purpose of the legislation." *Id.* It is necessary for a mine operator to seek and gain approval of any ventilation plan "deviation or modification" before it implements such, even if the operator is "acting [with] . . . a sincere belief that its actions [are] justified." *Id.*

ii. Mach Mining

Mach argues that Order No. 8414249 should be vacated. Mach drilled the borehole in advance of actually needing it in order "to hedge against the possibility that, without it, the mine would be shut down for several weeks if there were no other means to evaluate the effectiveness of the bleeder system." Mach Br. 21. The Secretary's regulations do not require that an operator obtain district manager approval before drilling a borehole and, "[r]ather, boreholes are only required to be approved before they are actually put to use in some functional way." *Id.* at 22. According to Mach, the Secretary confuses the "right of an operator to drill a borehole (which does not require approval) with the requirement of the operator to obtain approval if a borehole is adopted as part of its ventilation plan (which is required when, *inter alia*, the hole is used to facilitate an alternative method of evaluating the effectiveness of the bleeder system)." *Id.* at 24 (internal citation omitted).

"[T]here is no dispute that the borehole was never incorporated into Mach's ventilation plan, for bleeder evaluation or any other purpose." *Id.* at 23. Further, there is no evidence that Mach's actions "altered the air current in a manner that materially affected the safety or health of its miners." *Id.* Furthermore, "Mach did not make any changes to the content of its ventilation plan." *Id.*

Mach argues that the "requirements of section 75.371 are for informational purposes" and are "not design or performance standards." *Id.* at 24. Section 75.370(d) is the applicable standard requiring approval if the "operator plans to make an intentional change in the air current that could materially affect the health or safety of the miners." *Id.* Here, Mach made no such changes and MSHA has failed to offer any evidence that the air current was changed. *Id.*

Moreover, Mr. Webb credibly testified that it was "unthinkable as a matter of common sense that an 18" borehole could alter mine ventilation in a way that would have a material effect on the health or safety of miners, especially when [such hole was] so close to the mine's two bleeder exhaust shafts through which mine air exited the mine, pulled by the exhausting fan." *Id.* at 24-25 (internal footnote omitted).

Finally, Mach argues that the March 5, 2009, letter from MSHA to Mach says "nothing about needing approval to drill the hole. . . ." *Id.* at 25. According to Mach, it "was fully aware of its responsibility, per 30 C.F.R. § 75.371(z), to obtain district manager approval in advance of actually using the borehole in its ventilation plan as part of an alternative method of evaluating the effectiveness of its bleeders." *Id.* However, the "*possibility* of using the borehole to facilitate an alternative method did not mandate that Mach seek prophylactic approval to drill the hole." *Id.* (emphasis in original).

4. *Discussion*

Section 75.370(d) reads as follows:

> No proposed ventilation plan shall be implemented before it is approved by the district manager. Any intentional change to the ventilation system that alters the main air current or any split of the main air current in a manner that could materially affect the safety and health of the miners, or any change to the information required in § 75.371 shall be submitted to and approved by the district manager before implementation.

30 C.F.R. § 75.370(d).

This particular standard involves three separate directives. First, the mine operator is restricted from implementing a proposed ventilation plan, or in this case a plan revision, before that plan is approved by the district manager. In this instance, the proposed revision of the plan involved a potential change in the method of monitoring the effectiveness of the bleeder system. Specifically, Mach, and apparently MSHA, were evaluating the possibility of utilizing remote monitoring of the bleeder system via a borehole. While it is undisputed that a borehole was drilled from the surface into the mine bleeders, I find that the proposed revision to the method of monitoring the bleeders had not been implemented by Mach and, as such, it was not necessary to obtain the district manager's approval before drilling the borehole.

Mach's proposed revision, as pertinent to this case, addressed the means for determining the effectiveness of the bleeder system and any alternative methods of evaluation. The standard, by its plain language, would seem to require that the proposed change be "implemented" before approval in order for a violation to be found. In my order of June 29, 2009, which addressed the fact of violation in the context of Order No. 8414238, I found that "there [was] much more than a 'potential' that Mach [would] need to redesign its bleeder entries to accommodate the new

panel configuration[,]" and, as such, there was a violation of the standard. Order at 2. Here, the situation is much different. While the potential existed that Mach would change the means for determining the effectiveness of the bleeder system, it was nothing more than that; it was a "potential" or "possible" change. Mach had not begun to evaluate the effectiveness of the bleeders by way of the borehole, and drilling the borehole did not necessitate a change. Instead, as Mach has pointed out, drilling the borehole simply hedged against a potential shutdown in the event Mach did in fact implement remote monitoring of the bleeder system via the borehole after obtaining MSHA approval to do such. While drilling the borehole may have been an initial step toward such a change, it does not amount to implementing such a change. I credit both Jones' and Webb's testimony that the borehole was never actually used as a means for monitoring the effectiveness of the bleeders and, accordingly, I find that it was never implemented into the mine's ventilation plan. Instead, Mach continued to evaluate the bleeder system by its earlier approved methods. For the above reasons, I find that the drilling of the borehole did not amount to implementation of a proposed revision to the ventilation plan and, therefore, did not run afoul of the requirement that Mach obtain district manager approval.

In order for the Secretary to succeed in proving a violation in the context of the remainder of the cited standard, she must prove one of two things: (1) that Mach intentionally changed the ventilation system and, in doing so, altered the main air current or any split of the main air current in a manner that could materially affect the safety and health of the miners, or (2) that there was a change in the information required by section 75.371. For the reasons that follow, I find that the Secretary has again failed to satisfy her burden.

Again, it is undisputed that Mach intentionally drilled the subject borehole from the surface into the mine bleeders. Further, I credit Inspector Jones' testimony that air from the mine was coming out of the hole on the surface. Given that air was traveling from the mine to the surface via the borehole, a change in the subsurface airflow was obviously made when the borehole was punched through the mine roof. That change involved an unknown quantity of air, which was once directed through the underground portion of the mine, now traveling through the borehole and out of the mine. However, the cited standard requires more than a change to the main air current or a split of such. The change must not only alter the air current, it must alter it in such a way that it "could materially affect the safety and health of the miners[.]" On this issue, the Secretary has not succeeded in satisfying her burden.

While Jones believed that the borehole "had the potential to alter the airflow in the bleeder system," he acknowledged that he could not say if the borehole altered the air current in such a manner that it could materially affect the safety and health of miners. He agreed that the "potential" was there for the change to materially affect the safety and health of miners, but he conceded that there was no evidence at the time that there were dangerous or combustible levels of methane in the bleeder system when the drill bit punched through. Moreover, Jones tellingly did not allege any other potential dangers that the creation of the borehole could have created. Webb, who has a mine engineering background, testified that no miners were in the area at the time of the punch through and that the methane readings were below dangerous levels. I credit Webb's testimony. I find that Jones' statement that the "potential was there" that the change

could materially affect the safety and health of miners does not, without further evidence, come close to satisfying the Secretary's burden on this element. Jones offered nothing to support his statement and I can find nothing in the record from which I could reasonably infer that the borehole could materially affect the safety and health of miners. It is significant that Mach had previously installed two bleeder shafts less that 200 feet from the subject borehole that were part of its approved ventilation plan. There were fans on the top of each of these shafts that pulled significant amounts of air out of the mine in the vicinity of the subject borehole. (Tr. 113-14). The Secretary did not establish, and probably could not establish, that the addition of this third borehole, which was not equipped with a fan, altered the main air current or any split of the main air current in a manner that could have materially affected the safety and health of the miners.

Finally, with regard to the cited standard's directive that district manager approval be obtained before there is any change to the information required by section 75.371, I find that the Secretary has failed to satisfy her burden. The standard requires that any change to the information required by section 75.371 be submitted to, and approved by, the district manager. Section 75.371 requires that the mine ventilation plan contain certain specific information. The required information is laid out in the subsections of the standard. Here, the Secretary alleges that changes related to subsections (y) and (z) were made prior to obtaining district manager approval. Subsection 75.371(y) requires that "[t]he means for determining the effectiveness of bleeder systems" be included in the mine's ventilation plan. Likewise, as relevant to this analysis, subsection 75.371(z) requires that "[a]lternative methods of evaluation of the effectiveness of bleeder systems" be included in the mine's ventilation plan. I find that, for many of the same reasons discussed above with regard to plan implementation, no changes to the subject mine plan information were made. Mach was only considering changing the means or alternative methods of determining the effectiveness of the bleeder system. Drilling a borehole, by itself, does not change the means, or alternative methods, of determining the effectiveness of the bleeder system. Again, as discussed above, at the time this order was issued, the mine continued to evaluate the effectiveness of the bleeder systems by approved methods. While drilling a borehole might be a small step in working toward such a change, it does not amount to a change in the information required by the referenced subsections of 75.371. For the foregoing reasons, Order No. 8414249 is **VACATED**.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have reviewed the Assessed Violation History Reports, which are not disputed by Mach. Mach is a large mine operator. Mach in good faith stopped mining the No. 3 Headgate entries upon issuance of the order. The order was terminated on September 9, 2009, and a revised ventilation plan was subsequently approved. The penalty assessed in this decision will not have an adverse effect on Mach's ability to continue in business. The gravity and negligence findings are discussed above.

III. ORDER

For the reasons set forth above, Order No. 8414249 is **VACATED**. Order No. 8414238 is **MODIFIED** to a section 104(a) citation, as set forth in this decision and my earlier orders, as discussed above. Mach Mining, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of $100.00 within 30 days of the date of this decision.[2]

/s/ Richard W. Manning
Richard W. Manning
Administrative Law Judge

Distribution:

Edward V. Hartman, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St., 8th Floor, Chicago, IL 60604

Daniel W. Wolff, Esq., Crowell and Moring, 1001 Pennsylvania Ave., NW Washington, DC 20004-2595

[2] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

January 18, 2012

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2011-584 A.C. No. 33-04526-250713
v.	
BUCKINGHAM COAL COMPANY, Respondent	Mine: Buckingham No. 6

ORDER ACCEPTING APPEARANCE
DECISION APPROVING SETTLEMENT
ORDER TO PAY

Before: Judge Lesnick

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

The Secretary of Labor's Conference and Litigation Representative ("CLR") filed a notice of limited appearance with the penalty petition. It is **ORDERED** that the CLR be accepted to represent the Secretary. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

The CLR has filed a motion to approve settlement of the two violations involved in this matter. The originally proposed penalty amount was $33,800.00, and the proposed settlement is for $8,225.00, a reduction in the proposed penalty amount of approximately seventy-six percent. Citation Nos. 8026170 and 8026171 remain unchanged, but the CLR states that, given the record, the citations did not warrant a special assessment. In support of this reduction, the CLR states that upon reviewing "the factual evidence surrounding the existence of the violation[s]," the Secretary was persuaded that a special assessment was not appropriate "because no egregious conduct was exhibited by the operator." Sec'y Mot. at 2-3. The two violations at issue involved dust suppression sprays on a continuous miner. The CLR notes that (1) thirty of the dust suppression sprays on the miner were in operable condition, (2) no special assessment had ever been issued on that section under the cited standards, (3) the miner had not begun mining on the shift when pre-operational checks revealed problems with some of the sprays, and (4) all

workers were re-trained on the importance of checking and maintaining all of the dust suppression parameters of the miner at all times. *Id*.

I have considered the representations and documentation submitted in this case. Although the magnitude of the proposed reduction in penalty is large, I note that it is consistent with the Secretary's broad discretion in administering her Part 100 regulations. Section 100.5 of those regulations states in relevant part: "MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment." 30 C.F.R. § 100.5(a). Here, the Secretary reconsidered a determination that the cited conditions warranted a special assessment, which was consistent with the broad discretionary authority set forth in section 100.5(a).

I also find that the settlement motion proffered by the Secretary and agreed to by Buckingham Coal Company is fully supported by the particular facts set forth in the motion. My authority to review settlement agreements filed by the Secretary and mine operators is found at section 110(k) of the Act, which provides in relevant part: "No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). The Commission has held that section 110(k) "directs the Commission and its judges to protect the public interest by ensuring that all settlements of contested penalties are consistent with the Mine Act's objectives." *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981).

Although I am not bound by the Secretary's exercise of her discretion under the Part 100 regulations, *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 678-679 (Apr. 1987), in the context of the instant settlement agreement, I find it appropriate to defer to the judgment of the parties in arriving at an agreement that is consistent with those regulations and the factual bases for the change in the assessment formula used by the Secretary in proposing the penalties set forth in her motion. Particularly in light of the facts provided by the Secretary, I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act and "consistent with the Mine Act's objectives." *Knox County*, 3 FMSHRC at 2479.

The settlement amounts are as follows:

Citation No.	**Assessment**	**Settlement**
8026170	$20,900.00	$5,081.00
8026171	$12,900.00	$3,144.00
	$33,800.00	$8,225.00

Accordingly, the recommended settlement is **APPROVED** and the operator is **ORDERED TO PAY** $8,225.00 within thirty days of the date of this decision.[1] Upon receipt of payment, this case is **DISMISSED**.

/s/ Robert J. Lesnick
Robert J. Lesnick
Chief Administrative Law Judge

Distribution:

Barry L. Ryan, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 604 Cheat Road, Morgantown, WV 26508

Chris Cosgrave, Safety Director, P.O. Box 400, Corning, OH 43740

/tjr

[1]Payment may be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

January 18, 2012

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. YORK 2011-185 A.C. No. 18-00769-253489
v.	
VINDEX ENERGY CORPORATION, Respondent	Mine: Carlos Surface Mine

ORDER ACCEPTING APPEARANCE
DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge Lesnick

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

The Secretary of Labor's Conference and Litigation Representative ("CLR") filed a notice of limited appearance with the penalty petition. It is **ORDERED** that the CLR be accepted to represent the Secretary. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

The CLR has filed a motion to approve settlement. A reduction in the penalty from $8,893.00 to $3,996.00 is proposed, a reduction in the proposed penalty amount of approximately fifty-five percent. In support of this reduction, the CLR states that upon reviewing the gravity of the underlying violation as set forth in Citation No. 8028750, it was more appropriate to characterize the likelihood of injury or illness as "reasonably likely" rather than "highly likely" as originally alleged in the citation. I have considered the representations and documentation submitted in this case. Although the magnitude of the proposed reduction in penalty is large, I note that it is consistent with the Secretary's Part 100 regulations found in 30 C.F.R. Under Part 100, changing the likelihood of injury or illness from "highly likely" to "reasonably likely" results in a ten point reduction in total points, specifically, from 116 to 106 points. 30 C.F.R. § 100.3(e), Table XI. After applying a ten percent reduction to reflect the

operator's "good faith," the Part 100 formula results in a proposed penalty of $3,996, the amount agreed upon by the parties. 30 C.F.R. § 100.3(g), Table XIV.

I also find that the proposed change in the likelihood of injury or illness from "highly likely" to "reasonably likely" is adequately supported by the facts as set forth by the parties in the motion. The violation at issue here involved a mechanical portable screen that was moved at least once a shift, but which moved at an extremely slow rate of speed and posed far less of a danger of injury than originally found by the Secretary's representative. Motion at [2-3].

My authority to review settlement agreements filed by the Secretary and mine operators is found at section 110(k) of the Act, which provides in relevant part: "No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). The Commission has held that section 110(k) "directs the Commission and its judges to protect the public interest by ensuring that all settlements of contested penalties are consistent with the Mine Act's objectives." *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981).

Although I am not bound by the Secretary's Part 100 regulations, *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 673, 678-679 (Apr. 1987), in the context of a settlement agreement, I find it appropriate to defer to the judgment of the parties in arriving at an agreement that is consistent with those regulations and for which the parties have provided an adequate factual basis for the change in the designated gravity of the underlying violation. I thus conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act and "consistent with the Mine Act's objectives." *Knox County*, 3 FMSHRC at 2479.

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citation No. 8028750 be **MODIFIED** to reduce the likelihood of injury or illness from "highly likely" to "reasonably likely."

It is further **ORDERED** that the operator pay a penalty of $3,996.00 within thirty days of this order.[1] Upon receipt of payment, this matter is **DISMISSED**.

/s/ Robert J. Lesnick
Robert J. Lesnick
Chief Administrative Law Judge

[1]Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390

Distribution:

Robert W. Radosevich, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 604 Cheat Road, Morgantown, WV 26508

Eric Metheny, Vindex Energy Corporation, 265A Glass Dr., Mt. Lake Park, MD 21550

/tjr

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5266/FAX 303-844-5268

January 20, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2010-323-M
Petitioner,	:	A.C. No. 39-01514-204704-01
	:	
v.	:	Docket No. CENT 2010-324-M
	:	A.C. No. 39-01514-204704-02
	:	
BACHMANN SAND & GRAVEL,	:	Mine ID: 39-01514
Respondent.	:	Mine: Unit 1

DECISION

Appearances: Beau Ellis, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Wayne Bachmann, Bachmann Sand & Gravel, Winner, South Dakota, for Respondent.

Before: Judge Miller

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Bachmann Sand & Gravel ("BSG"), at its Winner, South Dakota mine (the "mine"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). This matter involves two dockets with six alleged violations, and a total proposed penalty of $8,686.00. The parties presented testimony and documentary evidence at the hearing held in Rapid City, South Dakota that commenced on December 7, 2011. At hearing, the Secretary vacated one citation, and modified two 104(d)(2) orders to 104(a) citations. The Secretary's proposed penalties for the modified orders were recalculated and are set forth below. At the conclusion of the hearing, I issued a decision on the record. That decision, with appropriate edits and additions, is set forth below.

I. LEGAL STANDARDS

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there

exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

> [i]n order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Wayne Bachmann operates Bachmann Sand & Gravel in Winner, South Dakota. The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration

pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that BSG is the operator of the mine, that its operations affect interstate commerce, and that it is subject to the jurisdiction of the Mine Act. Jt. Ex. 1.

Each of the citations in these cases were issued by Inspector Daniel Scherer, who has worked as a MSHA mine inspector since Sept 2006. Prior to becoming an inspector, Scherer worked in the mining industry for 16 years.

BSG is a small sand and gravel operation, which produces mostly sand. The property contains a screening operation and stacking conveyor, as well as a pit wall and a trailer that is used as a weigh station. The mine operates intermittently but was in open status on October 20, 2009, the day the inspection commenced. When Inspector Scherer arrived at the mine property, he could not locate the operator or any employee. Given the distance that inspectors must travel and the fact that notice of an inspection may not be given to an operator, it is MSHA's policy to attempt to contact mine owners and, if the owner cannot be contacted, to conduct inspections without anyone present. In this case, Inspector Scherer made several calls to Wayne Bachmann, the mine owner, without success. After making such attempts, he commenced his investigation. Shortly thereafter, a number of trucks driven by county employees arrived at the mine. The county employees began to operate the front end loader to load their own trucks and take away the sand. They explained to the inspector that they had received prior permission from the owner to be on the property and to load the sand onto their trucks in the event no one was present. Moreover, they indicated that Mr. Bachmann had been present the previous day loading the same trucks. Scherer observed that there were six county employees coming and going on the property. Mr. Bachmann did not arrive at the property to meet the inspector until the following day.

After careful consideration of all of the testimony, and having viewed the witnesses during the course of the hearing, and taking into account the inspector's unrebutted and credible testimony, I find Inspector Scherer to be a reliable and credible witness. I accept his assertions and testimony in all regards. Based on such, I find that the Secretary has established the fact of violation in each of the citations discussed below by a preponderance of the credible and probative evidence presented in this case.

a. *Order No. 6426224 (Docket No. CENT 2010-323-M)*

On October 20, 2009, Inspector Scherer issued Order No. 6426224 to BSG for a violation of section 56.14112(a)(1) of the Secretary's regulations. The cited standard requires that "[g]uards shall be constructed and maintained to . . . withstand the vibration, shock, and wear to which they will be subjected during normal operation." 30 C.F.R. § 56.14112(a)(1). The order alleges the following:

> Two expanded metal guards on the west side of the Kolman stacker conveyor at the self cleaning tail pulley were not constructed and maintained to withstand the vibration, shock, and

> wear to which they were subjected. One guard was damaged and torn free on one end causing it to hang down presenting an opening 10 inches wide by 4 inches high within 5 inches of the tail pulley and the other guard had shifted presenting an opening 4 inches wide by 20 inches high within 7 inches of the tail pulley. A miner works in this area as needed for clean up and to grease & maintain the equipment. Based on continued mining operations this condition exposes miners to contact with the tail pulley and to entanglement and the loss of limbs. The mine owner, Wayne Bachmann has engaged in aggravated conduct constituting more than ordinary negligence in that he had damaged the guard when operating the front end loader and had allowed the condition to continue to exist, also the owner has been cited on the two previous inspections for guarding on this conveyor at the tail pulley. This violation is an unwarrantable failure to comply with a mandatory standard.

The inspector found that an injury was reasonably likely to occur, that the injury could be reasonably expected to be of a permanently disabling nature, that the violation was significant and substantial, that one person would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary originally proposed a civil penalty in the amount of $4,000.00. At hearing, the Secretary modified this order to a 104(a) citation with high negligence, resulting in a newly proposed penalty of $363.00.

> [This] citation was issued for two expanded metal guards at the west side of the Kolman stacker conveyer . . . [near] the self-cleaning tail pulley. Those guards were not constructed and maintained to withstand the vibration, shock and wear to which they were subjected. The Inspector explains in detail his observations in his citation, and Mr. Bachmann has indicated that the observations of the Inspector are correct, including that two openings[, created by missing or inadequately attached guards,] were present near the moving pulley. One [opening] was 10 inches wide by 4 inches high [and] within 5 inches of the tail pulley[, while the other opening] . . . was 4 inches wide by 20 inches high [and] within 7 inches of the tail pulley. [Both openings were large enough to reach into.]
>
> . . .
>
> [The photographs in Secretary's] Exhibit P-7. . . clearly show the condition of the pulley and the guards missing from that pulley. One of [the guards] is [hanging loose and] buried in the

sand, and the other one [was missing and not on the machine, but] Mr. Bachmann later found [it]. . . . [T]he photographs [in]. . . [Secretary's Exhibit] P-7, . . . are a good indication of the condition of those guards and those pulleys. [*see* Sec'y Ex. P-7, pp. 4 and 5.] The two areas are open[]. One of [the guards] was buried in the sand . . . . [*Id*. at p. 5].

. . .

The [condition of the] guards that were . . . cited by Inspector Scherer [was] . . . obvious as he came up to the tail pulley. [(Tr. 42). One guard] . . . had been loose and hanging down[, while the other was missing entirely]. . . . [I]n Inspector Scherer's view they had been that way the day before when [the mine] . . . was running. [(Tr. 32).] One of his observations included the color of the sand and the location of the [one] guard[. Based on the color of the sand, Scherer determined that the guards] had been in that condition for some time[,] and that they had not been knocked off, as Mr. Bachmann alleges, the day before. [(Tr. 33).]

I credit Inspector Scherer's testimony and find that the guards . . . [had] been in that condition for some time and that the Secretary has established, as required by the mandatory standard, that the guard was not constructed or maintained to withstand the vibration, shock and wear to which it was subjected during normal operations.

While the belt was not operating at the time Inspector Scherer was there, it was clear that it had been operating the day before, and I find that it was operating with the guards in the condition as cited by Inspector Scherer. . . . I do not agree that the guards . . . had recently been knocked out of place by the loader[,] as alleged by Mr. Bachmann. I agree with Inspector Scherer that it was due to normal wear and tear and vibration and that the guards had been, over time, worn and somehow taken or moved on their own or by someone else from this particular area. The guard had shifted during working, and therefore I conclude that the Secretary has established a violation of Section 5614112[(a)(1)] as alleged by the Secretary.

The evidence clearly shows that the pulley was not guarded, and the photograph taken by Inspector Scherer shows the [the one] guard was partially buried in the sand[, thereby] . . .

exposing the moving machinery. I find the guard was not adequately maintained to withstand the vibration that it was subjected to.

There is no dispute that the guard was somehow damaged and that the tail pulley was exposed in two places. The exposed area was large enough for someone's hand to fit through. . . . [A]lthough the belt was not running at the time Inspector Scherer arrived, there is credible evidence that it had been operating the day before in the condition he observed.

Inspector Scherer was concerned that someone's hand or clothing could get caught in the self-cleaning tail pulley, and the Inspector determined that it was likely that someone would be injured based on this particular violation. [(Tr. 29-31).] The Inspector credibly testified that crushing injuries would occur if someone came in contact with the tail pulley, or[,] given the nature and location of the guard[,] someone could be caught on the sharp edges and either cut or trip in the sandy area around the tail pulley and be seriously injured. [*Id*.]

The violation created a hazard of someone coming in contact with moving machine parts[.] . . . [T]here was [a] reasonable [likelihood] . . . that . . . an accident would occur given the fact that . . . people have to come into this area to grease the tail pulley [and] . . . adjust the belt, sometimes with the conveyer in operation. . . .

The photograph[s] clearly show[] that the [general] area is very sandy, uneven ground and could easily lead to someone falling into the [subject] area[. Sec'y Ex. P-7, pp. 4and 5. Moveover,] . . . someone working in the area to clean the tail pulley could become entangled in the area. Therefore[,] I agree with Inspector Scherer that there is a reasonable likelihood that someone would be injured and that . . . [the] injury would be serious, causing a disabling or even fatal injury[.] . . . I find that the violation is significant and substantial . . . .[1]

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[1] I found this violation to be significant and substantial based upon the testimony of Scherer, which clearly described the openings, the access to the moving conveyor and machine parts, and the area around the conveyor, including the uneven and sloping, sandy ground. The tail pulley is accessed regularly to grease the pulley, adjust the belt, and monitor the equipment. The tail pulley and conveyor can easily be contacted by workers in the area and, as Scherer

(continued...)

> Finally, this citation was issued with high negligence . . . [b]ased upon . . . the Inspector's understanding that Bachmann had been cited for this violation before[.] . . . [This] is borne out by the exhibit submitted by the Secretary to show that this . . . [same] area of the tail pulley had been cited about a year prior to this in . . . September 2008. [(Tr. 36-38); Sec'y Ex. P-17.] This inspection was in October 2009 [and it was] . . .indeed the same area [that] had been cited [before.] Mr. Bachmann's conversation with the Inspector indicated that he was aware that . . . the guards were missing, . . . that he believed that they should not have to be in place, that he should not be required to keep them in place[,] and [that] he didn't find it a hazard because he was the only one working in the area and he knew that they were not in place.
>
> This [area] . . . does fill up with material. I understand that Mr. Bachmann has to remove the guard to clean it, but it is his responsibility to return those guards when they're done. I agree with the Inspector's determination that Mr. Bachmann was highly negligent[.] [T]he company had a duty to maintain the guards to withstand the vibration, wear and tear . . . [and] to return them if they took those guards off [to conduct any maintenance].
>
> After viewing the photographs of the guarding before and after the violation was issued, [Sec'y Ex. P-7, pp. 4-6] I find that . . . this violation was easily noticed by anyone, [i.e.,] that it was out in the open and would have been seen. . . . [I]n fact, Mr. Bachmann indicated to the Inspector that he knew those guards were off.[[2]] . . . [T]herefore[,] I find that the negligence is high. . . . [B]ased upon the seriousness of the violation [and] someone getting caught in this moving tail pulley and being seriously

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[1](...continued)
noted, the pulley "is not forgiving". There is a very real danger of getting tangled in the pulley or belt and of getting caught on the sharp metal edges of the dangling guard. The unguarded belt and pulley was a safety hazard if a person were to slip and contact the belt, the pulley, or even the bent guard.

[2] Bachmann told Scherer that he knew the one guard had shifted. (Tr. 43-44). He also agreed that he had removed the other guard, knew where it was located, and would put it back. Both guards were repaired by the time Scherer returned the following day. When speaking to Bachmann about the guards, Scherer was told that Bachmann did not believe the guards were necessary and that he was tired of putting them back in place.

> injured, and the fact that Bachmann demonstrated high negligence, I assess a $500 penalty for this violation.

(Tr. 113-119).

b. *Citation No. 6426225 (Docket No. CENT 2010-324-M)*

On October 20, 2009, Inspector Scherer issued Citation No. 6426225 to BSG for a violation of section 56.14132(a) of the Secretary's regulations. The cited standard requires that "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." 30 C.F.R. § 56.14132(a). The order alleges the following:

> The backup alarm on the CAT 980C front end loader (SN 63X2069) had not been maintained in a functional condition and was not working when inspected. This front end loader is used to load out haul trucks in the stockpile area and to haul material from the pit walls to the hopper. Several haul trucks were operating near this front end loader and truck drivers were observed traveling in the area on foot. Based on continued mining operations this condition exposes the mobile equipment to collisions and the miners and mobile equipment operators in the area to crushing injuries from being run into or over.

The inspector found that an injury was reasonably likely to occur, that the injury could reasonably be expected to result in a fatality, that the violation was significant and substantial, that one person would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $243.00.

> Citation 6426225 . . . refers to a backup alarm on the Cat 980-C front-end loader [that] was not maintained in a functional condition and was not working when Inspector Scherer was at the mine. . . . Inspector Scherer had conversations with the county employees who were at the mine at the time[. (Tr. 55-56).] . . . [S]everal of these county employees were using the front-end loader to load the county trucks. They switched off during the day, taking turns using the front-end loader. . . . [T]his scenario . . . seems a little unusual to me. I have not heard of [situations where] . . . county employees come on . . . [a] mine site and . . . use the equipment of the mine site and load their own trucks, but they

were doing it at this [mine at the] time [Inspector Scherer was there].[3]

Inspector Scherer indicated that there were probably six or so county employees coming and going at the mine during that day. One of the employees who was operating [the] . . . front-end loader backed up the front-end loader for Inspector Scherer, and it was clear that the audible backup alarm was not operating at the time.

Inspector Scherer testified that he had another employee of the county conduct the test a second time and[,] again[,] the backup alarm was not working. [(Tr. 57).] I credit Inspector Scherer's testimony and find that indeed a violation of Section 56[.]14132[(a)] has been shown in this case. . . .

I understand that Mr. Bachmann asserts that he was not aware that . . .there was any problem with the backup alarm and he was not aware of how that alarm on the loader may have been repaired [between the time the violation was issued and when he returned to the mine the following day]. Nonetheless, I accept Inspector Scherer's representation that it was not working when he conducted his inspection[.] . . . [T]here is a violation of the mandatory standard.

This backup alarm standard is to protect people on foot and other people working in the area . . . [from] get[ting] injured. [O]ver the years . . . there have been a number of fatal injuries of people who have been injured by equipment backing up without an audible backup alarm.

. . . Inspector Scherer . . . designated this as a significant and substantial violation, and I agree with him. There were county employees in the area who didn't work at the mine . . . . Some of them were on foot. Some of them were in and out of this loader. Some of them were using other equipment. I can see how it would easily happen that[,] when this loader backed up, someone [or something] could be hit, either another piece of equipment or someone on foot. . . . [I]f they were hit, [it is more than reasonable to expect that] the injuries could be disabling or even fatal. [(Tr. 60-61).]

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[3] Instead of locking out the equipment, Scherer allowed it to be operated on the condition that a spotter was always present. (Tr. 57-58).

> . . . [D]ue to the number of people in the area, [including] people taking turns operating the loader . . . who are not familiar with this particular mine or who didn't know the backup alarm was not functioning, there were a number of people exposed [to this hazard. I find that there was more than a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature.] . . . I find that the Secretary has shown this . . . to be a significant and substantial violation.
>
> The Inspector found this violation to be moderate negligence on the part of the mine operator primarily based on his conversations with Mr. Bachmann that . . . Bachmann was not aware that the backup alarm was not functional. [I agree with the Inspector's assessment of the negligence.] . . . [T]he Secretary has proposed a penalty of $243 for this violation, and that is the penalty that I assess in this instance.

(Tr. 119-122).

c. *Citation No. 6426226 (Docket No. CENT 2010-324-M)*

On October 20, 2009, Inspector Scherer issued Citation No. 6426226 to BSG for a violation of section 56.14101(a)(2) of the Secretary's regulations. The cited standard requires that, "if equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." 30 C.F.R. § 56.14101(a)(2). The citation alleges the following:

> The parking brake on the CAT 980C front end loader (SN 63X2069) was not capable of holding the equipment with a typical load on the maximum grade it travels. The park [sic] brake offered no noticeable resistance when tested on a grade of approximately 3% with an empty bucket. This loader is used to feed material to the plant and to load out haul trucks and is operated near several other pieces of mobile equipment. The loader is operated on grades of up to 20% as measured with an abney level. This condition exposes the loader operator and other equipment operators to crushing injuries from being run over or pinned between pieces of mobile equipment.

The inspector found that an injury was reasonably likely to occur, that the injury could reasonably be expected to result in a fatality, that the violation was significant and substantial, that one person would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $243.00.

[C]itation No. 6426226 refers to the same front-end loader as the previous violation[, Citation No. 6426225]. Mr. Bachmann . . . indicates that he was not aware that the parking brake was not working. [(Tr. 66).] Inspector Scherer issued the citation based on . . . checking the parking brake [with the assistance] of one of the county employees who was at the mine. [In order to prevent exposure of anyone to a hazard,] Inspector Scherer tested the brake on a fairly level surface[, which was significantly less of a grade than the maximum grade that the loader would travel during normal operation. (Tr. 67-68). After the loader was stopped by compressing the regular brake, and the parking brake set, it continued to roll forward. Given that the brake would not hold an empty bucket on the level grade, Scherer did not want to risk attempting it on the maximum grade and with a normal load. (Tr. 67-68)].

As Inspector Scherer indicated in his citation, the parking brake was not capable of holding the equipment with a typical load on the maximum grade it travels. He could discern this because [when he tested it, the loader] . . . was . . . not even on the maximum grade it travels[,] . . . was not loaded[,] and the brake . . . [could] not hold the piece of equipment in place. He said there was no noticeable resistance when tested on a grade of approximately 3 percent[, a relatively level grade,] with an empty bucket. Again, the Inspector designated this violation as significant and substantial.

Based upon the testimony of Inspector Scherer and what he observed on the front-end loader on that particular day[,] and given the test [was conducted] on a really light grade and the brake wouldn't hold, I find that the Secretary has shown a violation of Section 5614101[(a)(2)] which requires that if equipped on self-propelled mobile equipment, parking brakes shall be capable of holding equipment with its typical load on the maximum grade it travels.

Based on the Inspector's testimony I find that the loader was equipped with parking brakes[,] but [the brakes] . . . were not capable of holding the loader with its typical load on the maximum grade. Therefore[,] I conclude that the company violated the regulation as alleged. I have found that there is a violation of this mandatory standard. I find that the violation creates a discrete safety hazard . . .[, i.e., that of the parking brake not holding while the vehicle is parked and someone is in the area of the equipment]. When the driver of the equipment gets out and expects the parking

brake to hold the truck in place and it doesn't, the driver might inadvertently walk around the equipment and be run over by the equipment when the brake doesn't hold. [(Tr. 70-71).] The same is true for any other person working in the area who may be exposed to this loader. [(Tr. 71).]

. . . [G]iven the fact that there were at least six county employees on the mine site that day, none of whom . . . [were] aware of the condition of this loader until . . . Inspector Scherer tested it and explained to them that the parking brake didn't hold, [and that] others come in and out of the area throughout the day and may not be aware of it, . . . if the loader had been parked . . . - with the expectation that the parking brake would hold and it didn't, . . . [it was] reasonably [likely that the condition would] cause a serious injury to miners. [Moreover, the county employees were not employees of the mine and were not, and could not be, completely familiar with equipment.]

This condition created a hazard of an employee[, or anyone else in the area,] being injured should the loader roll from its parked position. It's a hazard to the driver and to others in the area who assume the brake will hold.

The [county] truck drivers were required to use alternate means to hold the loader when parked during their work on that day, and if they did not use this alternate means, the truck would roll and hit someone in the area, someone not aware of the problem, and the injury would be fatal. There was foot traffic, a number of people in the area, and therefore I find that it's reasonably likely that an injury would occur as a result of this violation. [Any injury would be serious, and potentially fatal.]

Mr. Bachmann indicated . . . that the brake was working fine the next day when he arrived and he was not aware that there was any problem with the violation. . . . [T]he Inspector designated this as moderate negligence, and I agree[.] . . . I assess the $243 penalty as proposed by the Secretary.
(Tr. 122-126).

d. *Citation No. 6426227 (Docket No. CENT 2010-324-M)*

On October 20, 2009, Inspector Scherer issued Citation No. 6426227 to BSG for a violation of section 56.4130(b) of the Secretary's regulations. The cited standard requires that "[t]he area within the 25-foot perimeter [of unburied, flammable or combustible liquid storage

tanks] shall be kept free of dry vegetation." 30 C.F.R. § 56.4130(b). The order alleges the following:

> The area within the 25-foot perimeter of the elevated diesel storage tank at the fueling area was not kept free of dry vegetation. Dry grass and weeds up to 2 foot tall were under and around the tank and extended out to the road way and to an electrical panel presenting a fire hazard. Miners and truck drivers travel in this area daily and access this fuel tank on an as needed basis. This condition exposes miner to smoke inhalation and burns in trying to fight a fire in the early stages.

The inspector found that an injury was unlikely to occur, but that any injury could reasonably be expected to result in lost workdays or restricted duty, that the violation was not significant and substantial, that one person would be affected, and that the violation was the result of moderate negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of $100.00.

> Citation 6426227 . . . is a very straightforward . . .[,] non-S&S citation with a $100 penalty. . . . Inspector Scherer indicated that the area within the 25-foot perimeter of the elevated diesel storage tank at the fueling area was not kept free of dry vegetation, that dry grass and weeds up to 2 feet tall were under and around the tank and extended out to the roadway. [This condition created a potential hazard because of the combination of fuel and dry material that, if ignited, would threaten anyone in the area.]
>
> The Inspector cited the standard that requires that . . . [the 25 foot perimeter around, in this case, an unburied, flammable or combustible liquid storage tank be kept free of dry vegetation]. . . . This [citation involves a] . . . diesel fuel [tank], which . . . [had] flammable liquid [in it]. . . . I credit the Inspector's observation that there was dry grass within 25 feet of . . . [the tank]. [The condition was obvious. *see* Sec'y Ex. P-10, pp. 3-4.]
>
> Mr. Bachmann doesn't dispute that there was grass within the 25 feet [of the tank], but [he does state that,] on the next day[,] when he arrived at the mine[,] it was raining and[,] therefore[,] he disputes that it was dry. [(Tr. 78).] I credit the Inspector's testimony for what he observed on the day of his inspection. He designated this as not significant and substantial because[,] in his view[,] there was no likelihood that there might be some kind of fire[, since he did not observe an ignition source. (Tr. 80).] If there were [an ignition source,] someone might be seriously

> injured, but he didn't find there was a likelihood of that. Therefore[,] I agree with the Inspector and assess the $100 penalty as proposed by the Secretary.

(Tr. 126-127).

e. *Order No. 6426229 (Docket No. CENT 2010-323-M)*

On October 20, 2009, Inspector Scherer issued Order No. 6426229 to BSG for a violation of section 56.16006 of the Secretary's regulations. The cited standard requires that "[v]alves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use." 30 C.F.R. § 56.16006. The order alleges the following:

> The valve on the 120 lb. propane cylinder located alongside of the scale trailer on the roadway side was not properly protected by a cover. This propane cylinder was lying on its side parallel to the outside wall of the trailer with a regulator attached and was hooked into the trailers heating system. The cylinder valve was not provided with a protective collar or any type of protection. There were cinder blocks on the roof of the trailer located directly above the valve that were in use to hold roofing down. Various pieces of timber and pipe were in the area alongside of the cylinder. This cylinder had been placed this way for an extended period of time which exposes the valve to damage from contact. Miners and truck drivers travel in this area on a daily basis. This condition exposes miners and truck drivers to fire, explosion and impaling injuries from projectiles. Mine management has engaged in aggravated conduct constituting more than ordinary negligence in that they knew or should have been aware of this condition as it has existed for an extended period of time, was open and obvious and they are in this area on daily basis when the mine is in operation. This violation is an unwarrantable failure to comply with a mandatory standard.

The inspector found that an injury was unlikely to occur, that any injury could be reasonably expected to be of a permanently disabling nature, that the violation was not significant and substantial, that one person would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary proposed a civil penalty in the amount of $4,000.00. At hearing, the Secretary modified this order to a 104(a) citation with high negligence, resulting in a newly proposed penalty of $100.00. The Secretary's request to modify is **GRANTED**.

> [This citation involves a] propane tank stored next to[,] . . . under, [or] partially under the scale house[,] which is a trailer[.]

[Sec'y Ex. 11, pp. 3 and 4; Sec'y Ex. 12, p. 4] . . . [The] citation alleges that the propane cylinder alongside the scale trailer was not properly protected and [,]specifically[,] the cylinder valve was not properly protected.

The Respondent is charged with the violation of the mandatory standard . . . for failing to provide protection for the valve[] on the gas cylinder which . . .[was] used at the scale house. [The intent of the standard is to protect against the exposure of gas cylinder valves to the possibility of being struck, thereby unexpectedly releasing gas under great pressure, which may, given the right conditions, pose a fire or explosion hazard.]

Inspector Scherer referred to the valve[] . . . [on] the uncovered cylinder, as well as the attached line. . . .[A]ll of these devices were part of this one unit. [The photographs in Secretary's] Exhibit P-12, . . .Page 4, and . . . [Secretary's] Exhibit 11[,] . . . show this cylinder laying on its side next to the trailer, [with] no cap cover or guard[.] . . . [The tank] was not stored in a safe location[,] as it was exposed to [loose] lumber that was stored in the area[,] . . . a port-a-potty or outhouse that was next to it[,] and . . . cinderblocks on the roof above. If any of those items fell on the . . . valve, it could cause the pressur[ized] . . . gas to be released[.] . . . [T]herefore[, the tank] . . . was not stored in a safe position nor was there a cap or cover to protect the valve.

The valve on the . . . propane cylinder was not approved for horizontal use. [(Tr. 89-90).] The valve was not protected and was not in a safe location. There was a [gas] line running from the valve into the furnace located in[] the trailer. The valve is next to the outside of the trailer near the edge, and there [were] . . . materials . . . stacked alongside. . . . .[M]oving . . . materials . . . could strike the valve[. Morever,] . . . cinderblocks [were] located on the edge of the roof [directly] above the valve and[, according to Mr. Bachmann,] the port-a-potty next to [the cylinder] . . . had already been blown over at one point. [(Tr. 89, 100)] All of these things created a . . . hazard, but Inspector Scherer did not designate this as S&S. [Rather, Scherer] . . . determined that [an injury] . . . was not likely to occur.

Mr. Bachmann [first] indicated that this cylinder had been used . . . for years to heat the trailer, but[,] on the second day [of the inspection] Mr. Bachmann and his brother . . . were discussing this violation [again] with Inspector Scherer, and the brother became very angry and insulting and threw the cylinder down.

> [(Tr. 93-97).] Mr. Bachmann then opened the cylinder, and[,] in Inspector Scherer's view[,] he heard the gas released. [(Tr. 98-99).] Based on the sound and the smell [that came from the cylinder when it was opened, Scherer determined that] . . . some propane gas remained in that cylinder.[4] (Tr. 99).] It was full when it was installed, although it may have been [at] . . . a very low level at the time of the violation.
>
> The standard cited requires that . . . valves on . . . gas cylinders be protected by covers when they are stored[. This valve] was clearly not [protected] based upon the photograph. . . . I conclude that MSHA has established the violation and the citation is affirmed.
>
> . . . Inspector Scherer found that the violation was a result of high negligence . . . on the part of the operator . . . based upon the fact that [the cylinder] had been there for some time. . . . [However,] I'm not convinced that there was high negligence in this particular violation. . . .Mr. Bachmann's testimony [was] that [the cylinder]. . . wasn't used[,] . . . that it was [just] laying there[,] and that [he was not] . . . aware that it was a violation. [(Tr. 102-104).] . . . I find Mr. Bachmann's negligence to be moderate based upon his testimony . . . [and] I assess the [$100.00] . . . penalty that the Secretary has proposed in this particular case.

(Tr. 127-130).

III. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties provided in [the] Act. 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, in assessing civil monetary penalties, the Commission [ALJ] shall consider the six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the

[4] Bachmann testified that the cylinder had been upright, and that no propane remained in the cylinder. However, I credit Scherer's testimony to the contrary.

> effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i). Based on my above findings, I assess the following penalties:

Order No.	6426224[5]	$ 500.00
Citation No.	6426225	$ 243.00
Citation No.	6426226	$ 243.00
Citation No.	6426227	$ 100.00
Citation No.	6426228	Vacated by the Secretary prior to hearing
Order No.	6426229[6]	$ 100.00
Total:		$1,186.00

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the penalties listed above for a total penalty of $1,186.00. Bachmann Sand & Gravel is hereby **ORDERED** to pay the Secretary of Labor the sum of $1,186.00 within 30 days of the date of this decision.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

[5] At hearing Order No. 6426224 was modified by the Secretary to a 104(a) citation.

[6] At hearing Order No. 6426229 was modified by the Secretary to a 104(a) citation.

Distribution: (U.S. Postal Service Certified Mail, Return Receipt Requested)

Beau Ellis, Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202

Wayne Bachmann, Bachmann Sand & Gravel, 31357 U.S. Highway 18, Winner, SD 57580

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021
Telephone: 202-434-9933

January 24, 2011

LAKEVIEW ROCK PRODUCTS,	:	CONTEST PROCEEDING
Contestant,	:	
v.	:	**Docket No. WEST 2009-1455-RM**
	:	Citation No. 6580016; 08/31/2009
SECRETARY OF LABOR	:	Lakeview Rock Products
MINE SAFETY AND HEALTH	:	Mine ID: 42-01975,
ADMINISTRATION, (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	**Docket No. WEST 2010-271-M**
Petitioner,	:	A.C. No. 42-01975-200271-01
v.	:	
	:	**Docket No. WEST 2009-1041-M**
LAKEVIEW ROCK PRODUCTS	:	A.C. No. 42-01975-188142
Respondent	:	

Decision

Appearances: Alicia Truman, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Mine Safety
Kevin Watkins, Esq., General Counsel, Lakeview Rock Products, North Salt Lake, Utah.

Before: Judge Moran

This matter, originally involving many citations, was reduced to two matters at the hearing, which was held on August 2, 2011 in Salt Lake City, Utah. The first, Citation Number 6425423, alleges that Lakeview Rock Products, a sand and gravel operation, employing a single bench, failed to provide ample warning to persons within the blast area, in advance of blasting, and will be referred to as the "blasting violation." The second, Citation 6580016, addresses the action required where hazardous ground conditions are present. That matter, which will be referred to as the "highwall violation," asserts that miners were allowed to work below a hazardous highwall. For the reasons which follow, both citations are affirmed, along with the special findings, and the associated Contest Proceeding is dismissed.

The Blasting Violation; Citation Number 6425423, alleging a violation of 30 C.F.R. § 56.6306(f)(1) by failing to provide ample warning to those within the blast area.

As its title suggests, Section 56.6306 Loading, blasting, and security, addresses various safety aspects of blasting.[1] At issue here is subsection (f)(1) which provides:

> Before firing a blast (1) *Ample warning* shall be given to allow all persons to be evacuated; (2) Clear exit routes shall be provided for persons firing the round; and (3) All access routes to the *blast area* shall be guarded or barricaded to prevent the passage of persons or vehicles.

(emphasis added)

"*Blast area*" is defined as: "[T]he area in which concussion (shock wave), flying material, or gases from an explosion may cause injury to persons. 30 C.F.R. § 56.2 Definitions. The definition continues with the following guidance: "In determining the blast area, the following factors shall be considered: (1) Geology or material to be blasted. (2) Blast pattern. (3) Burden, depth, diameter, and angle of the holes. (4) Blasting experience of the mine. (5) Delay system, powder factor, and

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[1] The full text of the standard provides: Part 56. Safety and Health Standards--Surface Metal and Nonmetal Mines. Subpart E. Explosives, Use § 56.6306 Loading, blasting, and security. (a) When explosive materials or initiating systems are brought to the blast site, the blast site shall be attended; barricaded and posted with warning signs, such as "Danger," "Explosives," or "Keep Out;" or flagged against unauthorized entry. (b) Vehicles and equipment shall not be driven over explosive material or initiating systems in a manner which could contact the material or systems, or create other hazards. (c) Once loading begins, the only activities permitted within the blast site shall be those activities directly related to the blasting operation and the activities of surveying, stemming, sampling of geology, and reopening of holes, provided that reasonable care is exercised. Haulage activity is permitted near the base of a highwall being loaded or awaiting firing, provided no other haulage access exists. (d) Loading and blasting shall be conducted in a manner designed to facilitate a continuous process, with the blast fired as soon as possible following the completion of loading. If blasting a loaded round may be delayed for more than 72 hours, the operator shall notify the appropriate MSHA district office. (e) In electric blasting prior to connecting to the power source, and in nonelectric blasting prior to attaching an initiating device, all persons shall leave the blast area except persons in a blasting shelter or other location that protects them from concussion (shock wave), flying material, and gases. **(f) *Before firing a blast* – (1) *Ample warning shall be given to allow all persons to be evacuated*; (2) Clear exit routes shall be provided for persons firing the round; and (3) All access routes to the blast area shall be guarded or barricaded to prevent the passage of persons or vehicles.** (g) Work shall not resume in the blast area until a post-blast examination addressing potential blast-related hazards has been conducted by a person with the ability and experience to perform the examination. (emphasis added).

pounds per delay. (6) Type and amount of explosive material. (7) Type and amount of stemming. 30 C.F.R. § 56.2. The definition of "blast area" can be sharpened to focus on the issue presented here: the flyrock. Using that approach, the applicable portion of that definition is "the area in which flying material from an explosion may cause injury to persons." While it is indisputable, under the plain text of the guidance, that the enumerated factors are to be considered, the list does not purport to exclude other relevant factors in determining the blast area. Thus the list, while helpful, does not represent an exclusive list of the factors that are to be considered when conducting the ultra-hazardous activity of blasting. Restated, one must not lose sight of the fact that the definition of "blast area" cannot be overtaken simply by a list of factors that are to be considered.

The facts are not in dispute; the issue here is the applicability of those facts to the cited provision. On April 10, 2009, at about 2:45 p.m., Lakeview "conducted a blast in an area high up on the east end of the mine's highwall." Sec. Br. at 3. That blast produced flyrock which penetrated the roof of a nearby residential home which was located off the mine site. The flyrock then proceeded to travel through the home's attic and ended up in the home's living room.[2] That home, a new residence, some 600 to 700 yards away from the detonation site, was situated above the mine's highwall. As there is no dispute that the flyrock came from Lakeview's blast and that it penetrated the house, the only issue is whether the standard applies to these admitted circumstances.

The event was investigated by MSHA Inspector Marc Shadden. He determined that an area of the blast had "rifled,"[3] and that this resulted in the flyrock reaching the residence. Factoring the location of the blast, the proximity of the residence and the risk of flyrock, Inspector Shadden concluded that the home was within the potential blast area. Once that determination was made, that the home was within the blast area, ineluctably the conclusion was reached by MSHA that, as it was undisputed that the homeowners were not given any warning before the blast was detonated, a violation of the standard occurred.

The Parties' Contentions.

The Secretary contends that, to comply with the standard, there must be ample warning given to those within the "blast area." Sec. Br. at 4. She looks to the definition of that term, "blast area,"

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[2] A matter of good luck, although the homeowners' three children were home at the time of the blast event, as was their mother, no one was injured. To be precise, and as noted in the citation itself, the flyrock minimally penetrated the living room's ceiling, "coming to rest just beneath [the] gypsum wall board lining the inner ceiling of . . . the living room." The homeowner testified that some small particles reached the living room floor. Tr. 30. The fact the flyrock pierced the roof is *ample* evidence of the seriousness of the event.

[3] "Rifling" refers to energy from a blast projecting upwards, instead of laterally. Poor loading practices or simply voids in the material being blasted can result in rifling. The conglomerate material being blasted at the Respondent's mine increases the possibility of voids being present. Sec. Br. at 8.

which, as previously noted, is a defined term, and concisely expressed as "the area in which concussion (shock wave), flying material, or gases from an explosion *may* cause injury to persons." The Secretary emphasizes that in this instance there is no need to speculate whether the flyrock could have caused an injury, since the rock not only reached the residence but pierced the structure itself. As damage actually happened here, the facts go beyond the situation where such material *may* cause injury, progressing to the point where it *did* cause damage to a residential home, and therefore the Secretary contends that the home was indisputably within the blast area. As ample warning must be given to those within the blast area, and Lakeview concedes it gave no warning at all to the residence's occupants, the Secretary urges that the violation has been established.

For its part, Lakeview contends that, at the time of the blast, it had no reasonable basis on which to extend the blast area to include the home, even though it acknowledges that the flyrock penetrated the structure's roof, proceeded through the attic and ended up in the family's living room. Lakeview relies upon the recounting of its blaster, who stated that the blast in issue was "nearly identical to prior blasts in the same area" and consequently it contends "that [the blaster, Robert Hylemon] acted reasonably and prudently with the 'blast at issue.'" Lakeview Br. at 2-3. Accordingly, Lakeview asserts that, as the blast in question was only ten feet away from the previous blast and nearly identical to that earlier blast, it would be unreasonable to hold the mine liable under the cited standard and to expand the blast area simply because of the flyrock result here. *Id.* at 3. Thus, ultimately, it is Contestant's position that the Citation should be vacated on the basis that the Secretary failed to meet her burden of proof. *Id*. at 4.

In its Reply, the Secretary contends that Lakeview has missed the central point that its failure was not correctly determining the actual blast area. Sec. Reply at 1. Thus, Lakeview's notifying those within the blast zone *it identified* means nothing if it incorrectly identified the zone itself.[4] Instead, the Secretary contends that the appropriateness of a blast zone is a blast-by-blast test, employed by an experienced mine blaster. In responding to Lakeview's claim that the blast was "not unusual" from the other blasts it had detonated, the Secretary disputes that characterization, arguing that the *location* of the blast was certainly unusual due to its being located in the upper northeast corner of the highwall and so close to the recently built residences. The Secretary points out that even Lakeview's Hylemon acknowledged that proximity to residences is a factor a blaster must consider. Yet Hylemon, the one who needed to know such information, did not even know of the existence of the nearby housing. A prudent blaster, the Secretary submits, should have examined the top of the highwall and thereby become informed as to what was above the spot where the blast was detonated. Without taking that action, Lakeview cannot claim that it made a proper assessment of the location of the blast. *Id.* at 2.

The Secretary also challenges the claim by Lakeview that the incident in question was the *only* such occurrence by pointing out that the blaster, not learning until the next day of the damage

[4] Illustrating the inadequacy of such a test, the Secretary asserts that if the blast zone is entirely up to the mine to designate, in theory, it could announce that the zone was as small as ten feet and then duly notify those in that area and meet its obligation.

to the house and being informed of this event *by others*, is hardly an authority on where flyrock had landed on other occasions.[5] Last, the Secretary maintains that Lakeview misconstrues the Commission's holding in *Hobet Mining*, arguing that the case stands for the principle that an experienced blaster must consider all relevant factors in determining the blast area. Here, it contends that Lakeview's Hylemon failed to carry out that duty by not considering, in fact not even knowing, of the proximity of the blast to the nearby residences. Sec. Reply at 3.

Discussion: Applicability of the standard to the uncontested facts.

As *Hobet Mining*, 9 FMSHRC 200 (1987) was cited by both sides, and because that decision does address the duties attendant to blasting, it is a good starting point. Though a different standard was cited, 30 C.F.R. § 77.1303(h), it similarly provided that "[a]mple warning shall be given before blasts are fired."[6] The standard also required that "[a]ll persons shall be cleared and removed from the blasting area" with "blasting area" itself defined as "the area near blasting operations in which . . . flying material can reasonably be expected to cause injury." 30 C.F.R. § 77.2(f). In *Hobet,* the blast generated flyrock and one miner was struck by it, becoming paralyzed below his chest. The Commission expressed in that case that the Secretary must establish that the mine failed to properly consider and employ the factors which a reasonably prudent person, familiar with mine blasting and the protective purposes of the standard would have used, concluding that the Secretary did not meet that evidentiary requirement. Unlike the present case, in *Hobet* the inspector failed to ask if the blaster considered the various factors which included things like the amount and type of explosive used, the depth of the holes that constitute the shot, and the topography. Against that shortcoming the blaster testified, without contradiction, that he *did* take into account the various factors.

Hobet is distinguishable from the present matter. As noted, *Hobet* vacated the order and citation on the basis that the Secretary failed to prove the alleged violation of section 77.1303(h). Per that decision, the determination of the blasting area depends upon a number of variables. These include, *but are not limited to,* factors such as the results of prior shots, the depths of holes for the shots, the experience of the blaster and the topography. The Commission expressly added that, while it identified some of the variables to be considered, its identification of some variables was *not* limited to those it mentioned. *Id.* at *203. Unlike in *Hobet,* where the blaster was not asked about the factors he considered before the blast, in the present matter Hylemon, Lakeview Rock's blaster, was asked about his consideration of the nearby residences and he admitted that not only did

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[5] In the Court's view, the Secretary's point is well-taken. On this record, it is just as likely that on other occasions flyrock landed in other areas beyond where the blaster anticipated that it would. The record simply doesn't inform about this, one way or the other. If for example, the flyrock here had landed in an open spot, such as an undeveloped lot in the residential area, and if no one was present to observe that event, it is very unlikely that Lakeview would have become aware of it, given what happened in this instance.

[6] The text of the standard cited in *Hobet* as well as the definition of "blasting area," remain the same in 2012, as in 1987.

he not consider the nearby homes, he did not even know of their presence, let alone their proximity. Thus, when the blaster was asked if he had calculated how nearby any residence was to where he was blasting and if he knew that a house had recently been built at that the location where the flyrock landed, he responded that he did not. Tr. 98. Nor did he go to the top of the pit where he was blasting and look around to see if anything new was up in that area. Tr. 99. The blaster also acknowledged the authoritativeness of the reference book, "Explosives and Rock Blasting," though he was only "vaguely" familiar with it. Tr. 102-103. Importantly, the blaster agreed that "proximity to residences" is something a blaster should consider when planning a blast. Tr. 104.

Although the Court considers it a side issue, the Secretary believes that the terms "blasting area" and "blast area" are distinguishable, asserting that the former has a limiting consideration – to flying material that can be *reasonably expected to cause injury*, but that the latter term, the one employed in section 56.6306, is broader in its application, encompassing the area where flying material may cause injury. Sec. Br. at 5. Thus, the Secretary asserts that there is no "reasonable expectation" limitation applicable to a "blast area." Although asserting that there is a distinction, the Secretary alternatively submits that the circumstances in this case meet the "blasting area" definition anyway. It maintains that it has demonstrated the presence of the factors a reasonably prudent person, familiar with mine blasting and the standard's protective purpose, would have considered, and which the Respondent failed to consider here. Such a reasonably prudent person engaged in blasting, it maintains, would have considered "the proximity of the blast to residences." Sec. Reply at 3.

In the Court's view, although, strictly speaking, "blast area," the term employed in this litigation and "blasting area," the term examined by the Commission in the *Hobet Mining* case, do not share identical definitions, it is not easy to apply their differences. This is because, once one moves beyond these similar, albeit not identical, expressions, it becomes necessary to practically apply them. When so applied, in the Court's view, there is no practical difference between the terms. This is because, the expression " *may* cause injury" cannot reasonably be considered to apply to *any* possibility no matter how small. The effect of that conclusion is that, under *Hobet,* determining the "blast area" or the "blasting area," both terms must mean the area where there is a reasonable expectation of an injury occurring.

It is worth remembering that this case is not in the realm of speculation. Thus, there is no argument disputing that the blast occurred, that flying material left the mine site, that it landed on the house with sufficient force to penetrate the residence's roof, not coming to rest until it reached the family's living room. Sec. Br. at 4. The Secretary therefore contends, and the Court agrees, those undisputed facts demonstrate that the home was within the blast area.[7] That being the case,

[7] Though a fellow ALJ decision is non-binding on another ALJ, the Secretary notes that in *Orica USA*, 32 FMSHRC 709, 712 (2010) the judge did agree with the Secretary's interpretation that a mine is not excused from the duty to protect those within the blast area simply because it is beyond the mine's property lines. Sec. Br. at 4.

the Respondent was required to give ample warning to the homeowners and it is undisputed that the homeowners were given no warning at all.[8]

Based on the foregoing discussion, the Court finds that the standard was violated.

Although not the basis for this determination, the Court also considers that it would be reasonable to conclude that, absent a defiant employee's intentional act, despite an ample warning to allow evacuation from the blast area, whenever there is injury to persons or structures housing persons resulting from blasting, liability under this blasting - ample warning and evacuation - standard should be deemed as established. Remembering that, under the standard, ample warning shall be given before blasts are fired and that all persons shall be cleared and removed from the blasting area to protect them from blasting flyrock,[9] to allow all persons to be evacuated, it is clear that the intent of this standard is to ensure that miners are not injured from flyrock. Yet, in *Hobet Mining*, the Commission found no violation had where the blaster and two crew members "remained in the open . . . to detonate and observe the blast," and a miner "sustained severe permanent injuries, including paralysis below his chest," because of the lack of specific evidence to show that Hobet failed to consider "the various factors that affected flyrock generation." *Hobet* at 203. Similarly, in *Secretary v. Western Mobile New Mexico, Inc.*, 17 FMSHRC 2222 (December 18, 1995, ALJ), when an individual was "seriously injured" from flyrock, when he stood next to a pickup truck at the time of the blast, and the *intended* "shelter" was to take cover behind a pickup truck, the violation was vacated on the grounds that the blaster considered the factors a reasonably prudent blaster would have considered.

These outcomes can be viewed as unusual, at least when individuals sustain injuries from blasting, and there is no willful defiance to take cover from flyrock. Such situations may be distinguished from situations where no injuries result from a blast and there is only speculation as to whether the blasting factors were fully considered. The non-liability determinations are unusual because, apart from this mine safety context, blasting is typically described in other liability contexts as an activity of an "ultra-hazardous nature" for which strict liability attaches for any resulting harm. In holding those conducting blasting accountable, courts frequently invoke the the principle of *res ipsa loquitur*. These principles have been long standing. For example, in *Rote v. Bellefonte Furnace Company*, 37 Pa. C.C. 315, 1906 WL 2951 (Pa. Comm. Pl.) (1906), homeowners close to a quarry

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[8] The Secretary notes that "ample" is not defined but that the dictionary defines it as something "'marked by extensive or more than adequate size, volume, space or room'" and she draws from this that the warning must be "'more than adequate.'" Sec. Br. at 5 (citations omitted). The Court notes that other dictionary sources include "[s]ufficient for a particular need," under the definition of "ample." Webster's II New Riverside University Dictionary (1984).

[9] While 30 C.F.R. § 56.6306 (f) speaks in terms of ample warning to allow evacuation from the blast area 30 C.F.R. § 77.1303 allows, as an alternative to evacuation from the blasting area, suitable blasting shelters to protect miners from flyrock.

had their dwellings hit by rocks produced by blasting. The mine failed to give notice of its blasting to the homeowners. As with Lakeview, the mine contended that it had "conducted [itself] along the safest and most careful lines known to the business." *Id.* at * 1. However, the Court observed that "[s]uch blasting without ample warning is always dangerous, and might be fatal," and it concluded that liability attached *regardless* of whether any negligence was involved. *Id.* at *3. Similarly, in *Allegheny Coke Co. v. Massey*, 174 S.W. 499, 163 Ky. 792, (March 26, 1915), the Pike County Circuit Court held that where blasting cast a rock upon one's dwelling, the mine contractor was liable, regardless of negligence. There, ample warning was given before the blast and the family ran into their home. Unfortunately a rock went through a window, blinding a child in one eye. The point is that, where the activity is blasting, liability was found to be absolute. The Court observed, "it makes no difference whether precautions are used or not to prevent the injury . . . the act itself is a nuisance." *Id.* at * 500.

Thus, the cases involving blasting examine only whether harm resulted and hold those conducting that activity strictly liable. Accordingly, in cases such as *Garland Coal & Mining Company v. Few,* 267 F.2d 785 (10th Cir. 1959), an action by a landowner for damages from the adjacent mine's blasting activity was upheld on a strict liability basis and that strict liability extended to more than flyrock, as it included damages from concussion and vibration. This has been the longstanding result in American jurisdictions where blasting operations produce harm; there is no duty to establish evidence of a breach of a standard of care to establish liability for harm from such activities. *Smith v. Yoho,* 324 P.2d 531, 533 (Okla. 1957), *Ward v. H. B. Zachry Const. Co.*, 570 F.2d 892, 895-96 (10th Cir. 1978). Thus, it seems an anomaly that, in the context of the remedial statute that the Mine Act is, liability for harm associated with blasting activity would be more burdensome to establish than in a common law proceeding. Obviously, adopting such a view would require a revisiting of the *Hobet* standard. However, if a strict liability approach were to be applied in instances such as *Hobet* and *Western Mobile,* mine operators would likely react with a more stringent approach in terms of these blast warning standards and situations such as the significant injuries in those cases would likely be reduced. So too, homes, such as the residence in this case, would be less likely to be assaulted by flyrock from blasting.

Penalty Determination.
Significant and Substantial finding.

As noted, the blasting violation was marked as "significant and substantial" ("S & S") by the issuing inspector. An S & S violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that in order "to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result

in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); see also, Buck Creek Coal, Inc. v. MSHA, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g *Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving Mathies criteria).

In *U.S. Steel Mining Co., Inc*., 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance, offering "[w]e have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1866, 1868 (Aug. 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984). This evaluation is made in terms of "continued normal mining operations." *U.S. Steel,* 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Inspector Shadden marked Citation No. 6425423 as "S & S" upon his conclusion that the facts showed that there was a reasonable likelihood that the hazard contributed to would result in an injury of a reasonably serious nature. Speaking to the first two elements identified in *Mathies Coal*, the Secretary supports her assertion that this matter was significant and substantial based upon the establishment of the violation and that the risk of being struck by a rock from the blast contributed to a discrete safety hazard.[10] As to the last two *Mathies'* elements, the Secretary maintains that the lack of a warning denied the homeowners the chance to evacuate and thereby created a reasonable likelihood that the hazard would result in an injury. It is the Secretary's position that the risk of flyrock is inherent whenever blasting is involved and, given that, the Respondent should have considered both that inherent risk along with the proximity of the residences to its blast site. Had those factors been appropriately considered in the equation, the Respondent would have been prompted to include the homeowners among those to be warned in advance.[11] The Secretary asserts that the fourth *Mathies*' element was clearly met, as the failure

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[10] With regard to this element, the Secretary cites *Central Appalachia Mining*, 29 FMSHRC 430 at 443-444 (June 2007) (ALJ), for the proposition that failure to provide ample warning of a blast creates a discrete safety hazard in that it deprives miners [and others] of the opportunity to take precautions to protect themselves from the blast's possible consequences.

[11] As with a tornado warning, perhaps residents subjected to the risk of fly rock would retreat to their basement or some other more secure part of their homes if there had been a warning. Also, it is not unreasonable to assume that if the Respondent had been aware of the relatively close proximity of the homes, the mine would have taken other steps to reduce the

(continued...)

to provide an advance warning of the blast created a reasonable likelihood of a fatal accident. Apart from GX 7, which is fatality report arising from an instance when flyrock from a blast struck a miner, the Court notes again that the fact the rock was able to go through the homeowner's room and crash through to their living area more than suffices to demonstrate this element. A force of that size, creating the damage it did, obviously presented the risk of a serious injury. Accordingly, based on the above discussion, the Court finds that the violation was established as "significant and substantial."

Degree of Negligence

Noting that the Part 100 regulations define "moderate negligence" as the situation when a mine operator did know or should have known of the violative condition or practice but for which there are mitigating circumstances, the Secretary maintains that when Lakeview moved to a new location for blasting, it was incumbent upon them to take steps to ensure that everyone in the blast area was adequately warned. Sec. Br. at 10. Instead, Hylemon not only failed to calculate and therefore consider the proximity of the residences to the blast site, he did not even know the homes were there. Had he examined the area above the top of the highwall, as he should have, he would have discovered the home sites. Further, while Hylemon asserted, in effect, that this was a one of a kind event and therefore, implicitly, unpredictable, the Secretary, as previously noted, observes that even after the event, Hylemon had no idea that flyrock had hit a residence until mine management so informed him the following day. Therefore, his testimony that this event was unique is unsupported. Given these undisputed circumstances, the Court agrees that Lakeview's failures constituted at least moderate negligence.

Based upon the *Hobet* standard, the finding that the violation was significant and substantial, and the result of at least moderate negligence, the remaining statutory criteria under Section 110(i) of the Mine Act also have been duly considered. Lakeview is a small to moderate operation, and its violation history is low to moderate. Exhibit A, associated with petition. Abatement was in good faith and there is no assertion that the penalties would affect the Respondent's ability to continue in business.[12] Upon consideration of those factors and the negligence and gravity, for which the Court believes the negligence is on the high end of moderate, approaching high negligence, and for the other aspects, as discussed above, the Court imposes a civil penalty of $1,000.00 (one thousand dollars) for this violation, an amount it considers to be a minimal assessment under these circumstances.

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[11](...continued)
flyrock. Even Hylemon agreed that the possibility of fly rock is the "number one thing" a blaster should consider in establishing a blast area, especially considering his acknowledgment that fly rock is the leading cause of injuries associated with blasting.

[12] These factors, excepting the analysis for gravity and negligence, apply equally to both matters involved in this litigation. *See infra.*

Citation No. 6580016. Alleged violation of 30 C.F.R. 56.3200.[13]

During a regular inspection on August 31, 2009 at Lakeview Rock's mine, MSHA Inspector Mary Busse observed what she believed to be an unstable highwall at the southeastern end of the mine. Her determination was based upon the presence of loose rock and the absence of an angle of repose. She also learned from a Lakeview supervisor that miners had been loading in the area at the base of that highwall only ten minutes before she observed the condition. Tr. 123.

The Secretary notes, and it is uncontested, that Lakeview's practice regarding the highwall is to bulldoze material from the top of the bench to the pit floor. This material then comes to rest at an angle of repose such that it stable and therefore safe for the day shift to then load it. Inspector Busse stated that on August 31st the material was not at an angle of repose. *See,* GX 8, GX 10, p. 1, as marked by a dotted line and marked with a "C."[14] Adding to this, the Inspector observed a sheer vertical face of about 50 feet.[15] Inspector Busse stated that there were several areas of loose material on the vertical face, including many rocks of football or basketball size. To these observations the Inspector stated that there was also a "crack," also described as a "slip area," on this wall, about 75 feet above ground level. This was significant to the Inspector because there was unstable material below that crack which could come down, posing a hazard to those below.

In addition to Inspector Busse's observations, MSHA Inspector Shane Mier also testified on the subject of the highwall. Mier was present on the same date as Busse and his testimony

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[13] The cited standard provides: "Part 56. Safety and Health Standards--Surface Metal and Nonmetal Mines. Subpart B. Ground Control. Scaling and Support. § 56.3200 Correction of hazardous conditions. Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry."

[14] This was not the normal state of affairs. The absence of the normally present angle of repose was attributed to the bulldozer operator's absence for a few days. Therefore the material from the top had not been pushed off, contrary to the customary practice. Although contradictory evidence was presented asserting that material had been pushed off from the top of the highwall on the Friday prior to the citation's issuance, no one presented this claim to Inspector Busse at the time of citation's issuance. For that reason, the Secretary urges that this tardy claim not be credited. The Court agrees that the claim is less reliable, coming late as it did. However, the more critical issue is whether the Court credits Inspector Busse's observations that the highwall presented the dangerous conditions cited by the Inspector. The Court does so credit Inspector Busse's assessment of the hazardous conditions with the highwall. The issue of when material had last been bulldozed from the top of the highwall is a secondary matter, not critical to the determination of whether there were hazardous ground conditions.

[15] This is indicated on GX 10, page 1, by a box between the two dotted lines and on GX 9 at page 3, where the sheer face area was marked.

supported Busse's findings, as he found the same hazards present. These included the presence of the "crack" Busse had observed, the failure to have the highwall sloped to the angle of repose, and the overhanging material above the area where the loader had been working.

MSHA civil engineer James Pfeifer, qualified as an expert on highwall conditions, also concluded that the situation observed by Busse was hazardous.[16]

Based upon the credible testimony of MSHA's witnesses, the Court finds that there is substantial evidence that the highwall presented hazardous ground conditions at the time of Inspector Busse's issuance of her citation. Though not critical to the finding of a hazard, there is also the testimony of Brad Trotter, Lakeview's night shift supervisor, which also supports the conclusion that the highwall presented a hazard. Tr. 299-313.

There is no genuine issue that miners were exposed to the hazardous conditions presented by the highwall, as Inspector Busse noted fresh tracks at the base of the wall and Mr. Trotter stated that the day shift crew had been in that area shortly before the Inspector's arrival. Lakeview's Pit Manager, Mr. Fowers, confirmed this as well, advising that a loader had been working at the base of the high until about 30 minutes before MSHA arrived. Based upon her observations, Inspector Busse issued a citation for a violation of 30 C.F.R. § 56.3200's requirement that "[g]round conditions that create a hazard to persons [are to be] taken down or supported before other work or travel is permitted in the affected area." As the Inspector found the presence of loose, overhanging and cracked material and other dangerous conditions, the Secretary asserts that such hazards constitute a violation of the standard. Sec. Br. at 11, citing *Hoover, Inc.*, 33 FMSHRC 751, 755 (ALJ 2011). The Court agrees.

Lakeview's perspective, while denying that the highwall was in fact hazardous, is more fundamental, as it contends that, even if one assumes that it was hazardous, the standard requires only that a barrier or a posting or warning be provided if workers could enter such an area "inadvertently." Lakeview Br. at 4. Turning to MSHA's Program and Policy Manual, Volume IV, it contends that, whatever the state of the highwall, the Secretary failed to provide any evidence that "workers could enter the area inadvertently." *Id.* Lakeview notes that the Policy Manual "states that '[p]osting of a warning against entry is required until corrective work is completed if workers could

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[16] Engineer Pfeifer noted the presence of a semi-circular tension crack on the wall. Given that crack's height on the wall, he believed a hazard existed. Pfeifer also concluded that there was a steep bank (described as a "scarp") above the tension crack and this signified to him that a portion of the wall had already moved. These were not the only areas of concern he had with the highwall, as he detected the presence of semi-circular failure planes, indicative of past wall failures. The steepness and height of the wall below the scarp was another indicator that much material could fall. Last, Pfeifer noted the toe of the highwall was quite steep, a sign that a loader had been digging into the wall. Based on all of his observations, Pfeifer concluded that the safety of the highwall was at one or less, which is an unacceptable safety factor, presenting a hazardous condition. The Court credits Pfeifer's analysis.

enter the area inadvertently.'" *Id.* at 4. In fact, Lakeview contends that inadvertent entry could not occur as the highwall was being attended "until at least a half an hour before the shift change," and employees "were told or understood that 'they [were] to stay out of the highwall." *Id*. at 4, citing transcript at p. 301. In sum, Lakeview emphasizes that, although the Secretary spent much time concerning alleged highwall hazards, the standard is concerned about keeping miners away from the highwall and that miners are safe while working at or near it. *Id.* at 5.

In its Reply Brief, the Secretary, assuming for the moment that Lakeview was correcting the highwall conditions when the citation was issued, maintains that such a claim does not disprove the violation.[17] This is because MSHA's Busse was informed that miners were working under the highwall when the violative conditions existed.[18] The Secretary asserts that the standard requires that the area be posted with a warning against entry and when the area is left unattended a barrier must be installed to impede unauthorized entry and that these requirements must be in place *until the corrective work is completed.* Sec. Br. at 5. Here, it notes, there is no evidence in the record that any warning sign or barrier had been put in place. *Id.* In fact, the area was required to be bermed off in order to abate the citation.[19]

Finally, the Secretary dismisses the claim that it is penalizing the mine operator for "addressing a hazardous condition in the course of Respondent's normal operations," because the standard requires that hazardous conditions are to addressed *before* work or travel occurs in such an area and the evidence shows that mining activity continued.[20] Sec. Reply at 6.

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[17] Describing it as irrelevant, the Secretary also asserts that the claim that a bulldozer was about to push material off the top of the highwall is unreliable as well because no one made such a claim to the MSHA Inspector at the time the citation was issued. The Secretary also points to contradictory testimony that Inspector Busse was advised no dozer operator would be present until the next day. Sec. Reply Br. at 5, citing Tr. 183.

[18] The Court agrees that when a mine is in the process of correcting a hazard when the inspector finds the violation, such activity does not foreclose the issuance of a citation where the evidence shows that the condition had not been corrected within a reasonable time after its discovery. Sec. Reply at 4, citing *Peabody Coal*, 1 FMSHRC 1121, 1135 (Aug. 1979) (ALJ) and *Road Fork Development Co.* , 2011 WL 4342749, *3, *14 (Aug. 2011) (ALJ).

[19] The Secretary also takes issue with the claim that there is no evidence in the record that the hazardous condition existed before she observed the conditions, pointing to the statement made to Inspector Busse admitting that miners had been beneath the highwall earlier that day and Mr. Trotter's and Mr. Fowers' concession that miners had been at the location shortly before. Sec. Reply at 6.

[20] Adding to that observation that conditions be corrected prior to work or travel occurring, the Secretary points out that Lakeview's own night shift manager agreed that the

(continued...)

Addressing Lakeview's other contention, that the highwall did not present a hazard, the Secretary points to the testimony of MSHA witnesses Busse, Mier and Pfiefer, not to mention Contestant's employee, night shift supervisor Trotter to refute that claim.[21]

Discussion:

An extended discussion of this violation is unnecessary. Given that the cited standard provides that "[g]round conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area [and that] [u]ntil corrective work is completed, the area shall be posted with a warning against entry and, [further] when left unattended, a barrier shall be installed to impede unauthorized entry," the evidence supports the Court's finding that the ground conditions cited by Inspector Busse created a hazard, and that work occurred in the affected area before the hazard was corrected. Thus, the key to the standard is that ground conditions be corrected *before* work or travel occurs in the affected area. Here, with mining ongoing at the base of the highwall, the standard's proscription against work in the affected area was violated. Accordingly, the violation was clearly established.

Penalty Determination.

As noted, Respondent was issued a section 104(d)(1) order, in which the negligence was marked as "high" and the gravity as "significant and substantial," with the injury and illness category marked as "reasonably likely" and "fatal."

The standard for evaluating whether a violation is "significant and substantial" has been previously discussed. The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp*., 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Id. at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Id. at 2003-04; *Rochester &*

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[20](...continued)
conditions that the miners were exposed to were hazardous. Sec. Reply at 6, citing Tr. at 299, 307-308.

[21] To Lakeview's argument that the crack still existed after additional material was later pushed from the top of the highwall, the Secretary replies that does not refute that the condition cited was a hazard when cited by the inspector. In this regard the Secretary points out that an experienced inspector's opinion that a hazard exists is entitled to substantial weight. Sec. Reply at 7, citing *Twenty Mile Coal*, 2011 WL 4440683, *29. (ALJ, August 2011). The Secretary also notes that the determination that a hazard existed was not limited to the crack as the sole basis for that conclusion. On the other side of the ledger, only Fowers' testimony supports Lakeview's claim. Reply at 8. Having considered the testimony of all the witnesses, the Court places more credence in those other witnesses.

Pittsburgh Coal Co., 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp*., 20 FMSHRC 790, 813 (Aug. 1998), rev'd on other grounds, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc*., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc*., 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. Consol., 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. REB Enters., Inc., 20 FMSHRC 203, 225 (Mar. 1998).

Significant and Substantial finding.

The Secretary contends that given the hazardous conditions found at the highwall and the exposure of miners working at its base, the violation was significant and substantial. Given the Court's findings that the standard was violated and its finding that miners were exposed to the discrete hazard of highwall failure or a rock fall, the first two elements were clearly demonstrated. Regarding the likelihood element, the Secretary notes that the focus is whether the violation, if left uncorrected, could contribute to a safety hazard. The Court finds that Lakewood's failure to adequately support the highwall and miners then working beneath that wall, contributed to a risk of serious, if not fatal, injury.

Inspector Busse stated her belief that it was reasonably likely that a fatal injury would result from the conditions she observed and the exposure, she learned, that the miners faced. These views were well-supported by the record, as Inspector Busse expressed that a small provocation would have precipitated a highwall failure or a rock slide. The combination of the sheer face and the slip area coupled with the vehicles working at the base made it a reasonable likelihood that the hazard contributed to would result in an injury. Under these circumstances, it is plain that any such wall failure would result in injuries of a serious nature. The Court finds Inspector Busse's assessment of the hazard and her determination that it was a significant and substantial violation to be the fact and it notes that the Inspector's view was buttressed by the testimony of MSHA expert Pfeifer.

Determination of Negligence and Unwarrantability

The Secretary maintains that, as the condition of the highwall was obvious and presented a serious hazard, coupled with the fact that Lakewood knew or should have known about the

condition, establishes high negligence and unwarrantability. The Court agrees with this assessment of the negligence involved in this instance. Even Mr. Trotter agreed that the highwall was inadequate. Although the obviousness of the condition is sufficient to sustain the finding of high negligence and an unwarrantable failure to comply with the mandatory standard, pit manager Greg Fowers was in the area of the highwall and was or should have been aware of the highwall's condition. Despite that, Mr. Fowers directed the loader operator to work at the base of the wall. While Mr. Fowers did not believe that the wall presented a hazard, that view has been rejected by the Court and the expression of Mr. Fowers' view only serves to establish that he was aware of the state of the highwall, albeit that he held a very different perspective of its condition. Based on all the credible evidence of record, the Court finds that a high degree of negligence was involved and that Lakeview Rock's failure constituted an unwarrantable failure.

Order

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), and the discussion above, the Court assesses the following civil penalties:

WEST 2009 1041, Citation No. 6425423 Penalty: $ 1,000.00

WEST 2010 271, Citation No. 6580016 Penalty: $ 2,000.00

For the reasons set forth above, Lakeview Rock Products is **ORDERED TO PAY** the Secretary of Labor the sum of $3,000.00 within 30 days of the date of this decision. Upon payment of the penalty, these proceedings are **DISMISSED**.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

Distribution:

Alicia Truman, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 800, Denver, CO 80202

Kevin Watkins, Esq., General Counsel, Lakeview Rock Products, P.O. Box 540700, 900 North Redwood Road, North Salt Lake, UT 84054-0700

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

January 25, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2009-168-M A.C. No. 04-00119-166066
v.	:	
GRANITE ROCK COMPANY, Respondent	:	Mine: A. R. Wilson Quarry

DECISION

Appearances: Larry Larson, Conference and Litigation Representative,
U.S. Department of Labor, Mine Safety and Health Administration,
Vacaville, California, on behalf of the Petitioner;
Jan Coplick, Esq., U.S. Department of Labor, Office of the Solicitor,
San Francisco, California, on behalf of the Petitioner;
Kevin Jeffery, Esq., Assistant General Counsel, Granite Rock Company,
Watsonville, California, on behalf of the Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration ("MSHA"), against Granite Rock Company ("Granite Rock"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act" or "Mine Act"), 30 U.S.C. § 815. The Secretary seeks civil penalties in the amount of $3,990.00 for two alleged violations of the Act and her mandatory safety standards.

A hearing was held in San Jose, California. The following are issues for resolution in this case: (1) whether Respondent violated 30 C.F.R. §§ 56.15005 and 56.11001; (2) whether the violations were significant and substantial; and (3) whether the violations were attributable to Granite Rock's moderate negligence. Petitioner's Post-hearing Brief is of record.[1] For the reasons set forth below, I AFFIRM, as issued, the citations and assess penalties against Respondent.

[1] Respondent elected not to file a Post-hearing Brief.

I. Stipulations

The parties stipulated as follows:

1. Respondent is the operator of the mine identified in the subject citations.

2. Respondent is engaged in mining as that term is defined in the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, the Mine Act.

3. The Respondent is subject to the jurisdiction of the Mine Act.

4. The Administrative Law Judge has jurisdiction in this matter.

5. The history of violations as shown on Exhibit A attached to the Petition in this matter accurately reflects that of Respondent.

6. The penalties of $3,990.00 will not affect Respondent's ability to continue in business.

7. When MSHA Inspector Jason Jeno issued the subject citations, he was acting in his official capacity as an authorized representative of the Secretary.

8. Citation Numbers 6443254 and 6443255 were properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated herein.

9. The two miners described in Citation Number 6443254 were not wearing fall protection equipment at the time Citation Number 6443254 was issued.

10. Eric Lewis and Steve Davison were properly trained in the identification of fall hazards and the proper use of effective fall protection equipment.

II. Factual Background

Jason Jeno is an MSHA inspector, a position that he had held for three years at the time of the hearing. Tr. 12. Prior to working for MSHA, he had 10 years experience working in the mining industry as a lead man and operating engineer. Tr. 13, 39. His experience included operating a crusher, manufacturing materials at three hot plants similar to the products made by Granite Rock, and performing repairs on numerous conveyors. Tr. 39.

The violations alleged in Citation Nos. 6443254 and 6443255 occurred on August 26, 2008, when Jeno was conducting a regular inspection at the A. R. Wilson Quarry, a surface rock, sand, and gravel mine located in San Benito County, California. Tr. 14-15. Granite Rock produces rock and sand for construction and other uses. Tr. 14. Inspector Jeno was accompanied by William Edminister, an inspector trainee, Frank Marichi, the miners' representative, and a mine foreman. Tr. 14.

Upon entering the area near the framework of the #4606 belt and #4919 magnet belt, Jeno saw two men working. Tr. 95. He approached the miners to observe their work practices, to ensure that lock-out/tag-out procedures were being followed, and to see whether they were wearing fall protection. Tr. 95. Once he arrived at the framework of the belts, he observed one miner standing on the #4606 conveyor belt and the other standing inside the framework of the #4919 magnet belt, working without wearing fall protection. Tr. 95-96. Consequently, he issued an imminent danger order to get the miners down from the conveyor belts. Tr. 95. Thereafter, based on his conversations with the miners, Jeno concluded that they were using the handrails and the framework of the conveyor to access and exit the belt and, accordingly, he issued the subject citations. Tr. 40.

III. Findings of Fact and Conclusions of Law

A. Citation No. 6443254

Inspector Jeno issued Citation No. 6443254, alleging a "significant and substantial" violation of section 56.15005 that was "highly likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Granite Rock's "moderate" negligence. Section 56.15005 requires that "[s]afety belts and lines shall be worn when persons work where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered." 30 C.F.R. § 56.15005. The Condition or Practice is described as follows:

> Two miners who were working in an elevated position located in the secondary area of the mine were not wearing fall protection where there was a danger of falling. One miner was standing on belt #4606 helping another miner who was working inside the support structure for magnet belt #4919. This condition exposed the miners to an estimated 16 foot fall to the ground level below. A fall from this height would likely result in fatal injuries.

Ex. P-1. The citation was terminated after the miners used a manlift, an altering forklift, extension ladders, and safety harnesses and lanyards to build a work platform to access the conveyor belts. Tr. 125.

1. Fact of Violation

In order to establish a violation of one of her safety standards, the Secretary must prove that the violation occurred "by a preponderance of the credible evidence." *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)). Granite Rock has conceded that the violation of section 56.15005 occurred; however, it contests the gravity and negligence findings ascribed by the Secretary. Stip. 9; see Tr. 9.

2. Gravity

a. Likelihood and Type of Injury

i. Testimony

Inspector Jeno testified for the Secretary. He opined that the violation was highly likely to result in an injury because the men, without fall protection and carrying hand tools, were using the handrails and the frame of the conveyor to climb onto and stand on the #4606 belt conveyor. Tr. 25, 44. Jeno explained that he took into account the surface itself, the tools, loose rock, and dust on the conveyor belt, the instability of working in a non-designated work area, the general unsafe conditions associated with working on top of a conveyor, and the nature of the work, itself. Tr. 36-37. Jeno estimated the #4919 magnet belt to be suspended from 16 to 18 feet above ground; the magnet belt was 16 feet on the lower side and 18 feet on the higher side of the #4606 belt conveyor. Tr. 25. Consistent with his training, Jeno added the height of the miner to the belt's distance from the ground when he calculated the total fall distance. Tr. 48-49, 73-74. Jeno opined that a 16 to 18 foot fall, even a 12 foot fall, could be very serious because "usually falls from this height usually result in fatalities resulting from blunt force trauma striking an object on the way down, slip, trip, and fall hazard[s]." Tr. 26-28, 50-51. Furthermore, Jeno considered the configuration of the equipment and "took into account where the miner would fall, what he might fall into, what he might fall on and where he might fall[,]" when he evaluated the likelihood of an injury resulting in a fatality. Tr. 51. He testified that both miners could have fallen to the left onto the handrail or catwalk, or to the right onto the ground. Tr. 51. Jeno stated that he also took into account the fact that the miners could have fallen onto the travelway alongside the conveyor belt; however, he did not take into account the possibility that they could have fallen onto the screen deck, because the deck only covers the areas consisting of the width of the magnet belt and did not extend past the area where the miners were working. Tr. 52.

Henry Ramirez, Granite Rock's witness, had been the plant manager at the A. R. Wilson Quarry for 5 ½ years. Tr. 119. He opined that the miners "made a poor judgment call in relation to whether they saw a hazard or not." Tr. 120-21. He was told by the miners that they had used three points of contact when they climbed onto the #4606 conveyor to re-splice the #4919 belt.[2] Tr. 121-22. The three-points-of-contact method of access is covered under A. R. Wilson's slip, trip, and fall safety training. Tr. 122. Ramirez also opined that four beams, situated to the left and right of the #4919 magnet belt, would provide some measure of protection against falling if the miners were kneeling or sitting on the conveyor belt to perform their work, but not if they were standing. Tr. 123-24; see Ex. R-3, R-4, R-5, and R-6. Furthermore, referencing three photographs in evidence, it was his opinion that if one of the miners were to fall off the conveyor belt to the right, he would land on the screen decking. Tr. 127; Ex. P-9, P-10, and P-11.

Michael Herges, testifying for Granite Rock, had been the operator's safety health services manager for 10 ½ years. Tr. 139. Herges testified to the unlikelihood of injury based on the fact that the miners using three points of contact would have reduced the opportunity for

[2] Inspector Jeno described the three-points-of-contact method as keeping "either both hands or both feet and then one foot or one hand on the equipment as you're ascending or descending the area." Tr. 84.

falling, one side of the conveyor belt was covered by a walkway and, on the other side, the greater height, the screen would have reduced the opportunity for a fall. Tr. 141-42. He measured the distance from the belt to the ground to vary from 6 to 8 feet, and the distance from the other side of the magnet conveyor and the pole to the ground to be 11 feet. Tr. 155-56. Herges also noted that the conveyor belt was dry and, therefore, posed no hazard. Tr. 148. He admitted, however, that he did not observe the conditions of the magnet belt and the surrounding equipment on the day that the citations were issued, but a day or two thereafter. Tr. 159, 173. Furthermore, he explained that there are four eyeholes on top of the magnet belt structure and a 3/8 inch cable running the length of the conveyor that serve as sufficient tie-off points, and that the cable also serves as a barrier from falling on or against the belt. Tr. 159, 173, 176, 178. In his opinion, use of the cable to tie-off on the unprotected side of the belt would be effective, although he did not know whether it had been tested for its ability to sustain the weight of a person. Tr. 177, 181. Herges also testified that Granite Rock's policy requires use of fall protection when working in elevations of over 4 feet without handrails, and that he had witnessed miners at the quarry wearing fall protection while working in elevated areas. Tr. 162. He opined that the two miners were properly trained, but stated that he had not personally witnessed them using fall protection. Tr. 162, 164. He testified that Granite Rock does not make a special effort to monitor use of fall protection; according to him, supervisors only check usage incidental to monitoring work progress. Tr. 165-66.

ii. Analysis

Jeno pointed out that, even if the miners had used three points of contact in accessing the work area and performing their tasks, they did not have use of handholds to climb, but only the frame of the #4919 belt, and they were carrying tools. Tr. 84. Moreover, because they were standing at least part, if not the majority, of the time that they were working, the #4919 magnet belt's four beams would have provided only minimal, if any, protection. I credit Jeno's assessment that both miners could have fallen to the left onto the handrail or catwalk, or to the right onto the ground, and incurred injuries in either scenario. Even if a left-sided fall onto the walkway or handrails would have broken the fall, the potential for serious injury, such as severe head trauma or even death, remains high. As for a fall from the right, the evidence indicates that the screen decking does not cover the entire right side of the framework, and falling onto the screen decking also poses a high likelihood of serious injury. See Ex. P-6, P-10. Respecting the work area, I find that the conveyor was in a troughing position, the surface was slippery, and the tools, dust, and rocks on the belt created slip, trip, and fall hazards. For these reasons, the Secretary has established the high likelihood that a miner would be seriously injured if he were to fall as a result of working in an elevated position of at least 8 feet, without wearing fall protection. Therefore, I conclude that Citation No. 6443254 was appropriately assessed as highly likely to result in an injury that could reasonably be expected to be fatal.

b. Significant and Substantial

Inspector Jeno opined that the violation was significant and substantial ("S&S") because the miners' method of accessing the conveyor put them above the safety devices provided, and

was not a suitable means of access to the conveyor.[3] Tr. 27. He testified that "[t]he hazard [was] standing on a conveyor that's not designed to be stand [sic] on or worked on. It's a slippery surface. It's in a troughing position, which cups and holds the materials. It's not—it's standing between the troughing rollers . . . ." Tr. 31. Furthermore, he asserted that the tools lying on the conveyor belt created tripping hazards, dust and loose rocks created slip, trip, and fall hazards, and standing between the troughing rollers created an unstable work surface. Tr. 37.

In *Mathies Coal Company*, the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard—that is, a measure of danger to safety—contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC 1, 3-4 (Jan. 1984); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). The Commission provided further guidance in *U.S. Steel Mining Company*:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial.

7 FMSHRC 1125, 1129 (Aug. 1985) (citations omitted); *see also Musser Eng'g, Inc. And PBS Coals, Inc.*, 32 FMSHRC 1257, 1281 (Oct. 2010). Additionally, "[t]he Secretary need not prove a reasonable likelihood that the violation itself will cause injury[.]" *Musser* at 1281. An evaluation of the reasonable likelihood of injury should be made in the context of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co.*, 6 FMSHRC 1573 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The first two *Mathies* criteria are easily satisfied. The fact of violation has been established, and the violation clearly contributed to the safety hazard of falling while working in an elevated position. The focus of the S&S analysis here is the third and fourth *Mathies* criteria, i.e., whether the hazard was reasonably likely to result in an injury, and whether the injury would

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[3] The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d)(1).

be serious. As discussed above, falling a distance of at least 8 to 12 feet is reasonably likely to result in serious injury.

In *Great Western Electric*, the Commission explained that a miner's "position twelve feet above the ground presented a substantial height from which to fall." 5 FMSHRC 840, 843 (May 1983); *see also generally Molton Co., LP*, 31 FMSHRC 427 (Mar. 2009) (ALJ) (crediting an inspector's testimony that fatal falls have occurred from heights of 10 feet or less, and finding an S&S violation where a miner was working without fall protection at a height of approximately 7 feet); *Cantera Green*, 21 FMSHRC 310 (Mar. 1999) (ALJ) (finding S&S, safe access violations where workers were working 8, 10, and 12 feet above ground); *Laramie Cnty. Road & Bridge*, 17 FMSHRC 902 (June 1995) (ALJ) (crediting an inspector's testimony that miners have been seriously injured and killed as a result of falling from heights of 8 to 12 feet, and finding an S&S violation). Moreover, the Commission has acknowledged that "[e]ven a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions, which could result in a fall." *Id.* at 842. Based on the evidence, I find that a fall from 8 to 12 feet would reasonably result in serious injuries ranging from broken bones and head trauma, possibly death. Therefore, I conclude that the violation of section 56.15005 was S&S.

3. Negligence

Jeno testified that "the mine operator had provided training to the miners, and there was [sic] no immediate supervisors in the area. And based on training that the miners told me that they had received, I chose moderate negligence rather than high negligence to the company." Tr. 28; Stip. 10. Harnesses and lanyards were located on the service truck nearby. Tr. 55. The aggravating factors that Jeno considered were lack of supervisory oversight of safety compliance, and lack of a job task analysis prior to commencement of the work. Tr. 55, 58. Jeno considered mitigating, the fact that two months prior, the same miners had identified a safe access hazard at another elevated work area, and the operator had permitted them to build a suitable work platform. Tr. 55-57. In summary, Jeno stated that the operator should have "[s]upervise[d] the area, instructed the miners in how to do it, [and performed] job tasks analysis before the work was conducted." Tr. 58. I have considered Granite Rock's fall protection policy and training, as well as its passive monitoring of compliance, and find that it was moderately negligent in violating the standard.

B. Citation No. 6443255

Section 56.11001 requires that "[s]afe means of access shall be provided and maintained to all working places." 30 C.F.R. § 56.11001. Jeno issued Citation No. 6443255, alleging an "S&S" violation of the standard, after observing the manner in which the miners were accessing the area in which they were working on the belts. The Citation further alleges that the condition was "highly likely" to cause an injury that could reasonably be expected to be "fatal," and was caused by Granite Rock's "moderate" negligence. The Condition or Practice is described as follows:

> A safe means of access was not being provided to access the magnet belt #4919 located in the secondary area of the mine. Two miners were accessing the magnet belt by means of climbing up the travelway handrails for belt #4606 and standing on belt #4606. This condition exposed the miners to a fall of about 16 feet to the ground level below. A fall from this height would likely result in fatal injuries.

Ex. P-3.

1. Fact of Violation

The Commission has held that section 56.11001 embodies the dual requirement of providing and maintaining safe access to working places. *Watkins Eng'rs & Constructors*, 24 FMSHRC 669, 680 (July 2002). A violation may be found when either or both prongs of the standard are not met. An operator's duty to "provide" a safe means of access incorporates the responsibility to instruct its employees on the procedure for safe access. *Id.* at 681. By interpreting "maintain" according to its plain meaning, the Commission has concluded that the term "requires an operator to uphold, keep up, continue, or preserve the safe means of access it has provided to a working place." *Lopke Quarries, Inc.*, 23 FMSHRC 705, 708 (July 2001); *Western Indus., Inc.*, 25 FMSHRC 449, 452 (Aug. 2003). The Commission has further explained that the duty to maintain safe access requires constant vigilance because it "'incorporates an on-going responsibility on the part of the operator to ensure that [the] means of safe access is utilized, as opposed to a purely passive approach in which an operator initially provides safe access and then has absolutely no further obligation.'" *Watkins*, 24 FMSHRC at 680 (quoting *Lopke*, 23 FMSHRC at 708). More is required than simply making a safe means of access "available," "[a]t a minimum, the standard's requirement that operators 'maintain' safe access to working places mandates that management officials utilize that access, and require other miners to do so." *Lopke*, 23 FMSHRC at 709.

a. Testimony

Inspector Jeno testified that he was told by the miners that "they had to use the handrails and the framework of the conveyor to enter and exit the belt" and, therefore, he concluded that they had misused the handrail as a ladder to access the #4606 conveyor. Tr. 40; see Tr. 35, 36. He described one miner's access by testifying that "[t]he handrails would have been to his right. He stepped up onto the mid-rail to his right and then lifted himself up, swung his foot over onto the frame of the conveyor and then stepped onto the belt." Tr. 107-08. Furthermore, he opined that, by stepping onto the handrail, the miners situated themselves above it and rendered it ineffective. Tr. 26. Jeno concluded that Granite Rock did not provide a safe means of access for the miners because no ladders were used, no ladders were provided at the end of the conveyor catwalk to access the #4919 magnet belt, and a man basket was available, but not used. Tr. 60. Additionally, he testified that he did not see any ladders or man baskets in the work area, and that he did not ask the miners whether they had been provided with ladders. Tr. 63-64, 78-79. In Jeno's opinion, portable ladders would have provided safe access to the work area. Tr. 80. Jeno initially testified that no tie-offs were available to which the miners could attach their

lanyards but, subsequently, acknowledged that the four eyeholes may have been adequate tie-off points if they had been within their reach. Tr. 62-63. However, he pointed out that the eyeholes were inaccessible while the miners were actively climbing the framework. Tr. 75. He also opined that the miners, with tools in hand, could not have ascended onto the conveyor by using the three-points-of-contact method. Tr. 84-85. Furthermore, he noted that it takes both hands to repair or change belt clips. Tr. 90-91.

Henry Ramirez testified that the miners told him "that they used three points of contact when they climbed onto 4406." Tr. 121-22. Climbing on equipment with three points of contact is something that is covered in A. R. Wilson's slip, trip, and fall safety training. Tr. 122. Ramirez did not see the miners access the work area, and was unsure of how the tools got onto the conveyor belt. Tr. 129-30. According to him, stepladders are standard equipment carried by the miners on their trucks but, because he was not present when the citations were issued, he did not know whether there was a ladder in the area at that time. Tr. 131-32.

Michael Herges testified that Granite Rock's safe means of access at the time of the citation would have been the three-points-of-contact method, and that miners are trained to use this procedure in accessing elevated areas. Tr. 145, 168. He opined that the standard was not violated because, presumptively, the three-points-of-contact method was used, sufficient tie-offs existed for use of lanyards and harnesses, and the conveyor belts could be accessed safely by using a portable ladder. Tr. 159, 163, 168. He drew these conclusions without having observed the miners accessing their work area on the day in question. Tr. 130, 164. As mentioned previously, Granite Rock only monitors miners' implementation of safety training tangential to supervisory oversight of work progress. Tr. 165-66.

b. Analysis

The record does not support Granite Rock's position that the three-points-of-contact method provided a safe means of access for the miners. Rather, I am persuaded that the miners could not have accessed the belts by keeping three solid points of contact at all times, especially because they had to climb the belt framework and, unlike climbing a ladder, there were no handholds for use during their ascent. Tools were present on the belt, and it is reasonable to infer that the miners carried some, if not all the tools, as they climbed up the conveyor belt framework. Moreover, the miners were repairing and changing belt clips which, as the Secretary has established, required use of both hands. Therefore, I find that at all times, the miners' hands were encumbered while they were accessing the work area, as well as while they were working and, for that reason, they could not have utilized the three-points-of-contact method, even if it were a safe way to access the work area and perform their duties.

The record also establishes that Granite Rock provided ladders to the miners for use in accessing the conveyor belts, based on credible testimony that stepladders are standard pieces of equipment on the trucks. Jeno opined that use of portable ladders is a safe means of accessing the work area, and admitted that, although he did not see a ladder at the end of the conveyor catwalk, he did not ask the miners whether ladders had been made available to them.

Additionally, the operator provided the miners with lanyards and harnesses. The four eyeholes located on top of the magnet belt structure and the 3/8 inch cable were sufficient tie-offs, and the cable also provided additional fall protection while they were working. Even Jeno conceded that the four eyeholes, overlooked in his initial assessment, may have been adequate tie-offs. Therefore, because Respondent provided the miners with safe access equipment, i.e., ladders, harnesses and lanyards, the first prong of section 56.11001 has been satisfied.

Providing training and safety equipment alone, however, is not enough to satisfy the requirements of section 56.11001; the standard requires more. The operator has an on-going, active responsibility to ensure compliance with safe means of accessing work places. At the time that the citations were issued, no supervisors were in the area to ensure that elevated areas were being accessed safely by use of the safety equipment provided to the miners. As a result, the miners were unprotected, their lanyards and harnesses were in the truck, and no portable ladders were being used to access the framework of the conveyor belt. Moreover, although it has been established that the miners had been properly trained, it is clear from the record that Granite Rock's compliance oversight was passive at best, the "purely passive approach" that the Commission has rejected in *Watkins* and *Lopke*. Accordingly, I conclude that the Secretary has established, by a preponderance of the evidence, that Granite Rock violated section 56.11001 by failing to maintain safe access to the #4606 conveyor and #4919 magnet belts.

2. Gravity

a. Likelihood and Type of Injury

Jeno marked Citation No. 6443255 as "highly likely" to result in an injury because "[t]here was no ladder. There was [sic] no handrails. There was no platform to work on so, therefore, the miners were working from the belt." Tr. 33. He did not consider how many points of contact the miners may have used when they accessed the work. Tr. 41. When asked how misusing the handrails was highly likely to cause death, Jeno responded that "they stepped onto the conveyor. They stepped onto the handrail, which puts them above the handrail. Now it becomes ineffective. And then they're stepping across over onto the frame of the conveyor, which now they have to straddle for a brief second to put the other foot on the frame of the conveyor and then swing the other leg onto the conveyor itself." Tr. 26. For the same reasons that were discussed respecting the fall protection violation, the Secretary has established the high likelihood that if a miner were to sustain a fall of 8 to 12 feet, the injury could reasonably be expected to be fatal.

b. Significant and Substantial

Under the same analysis applied to Citation No. 6443254, I find that the violation of section 56.11001 in Citation No. 6443255 was S&S. To reiterate, the violation has been established, it contributed to the hazard of falling from an elevated work area, it was reasonably likely to result in an injury because of the minimum fall distance of 8 to 12 feet, and the resulting injury would likely be serious, i.e., broken bones and head trauma, or death.

3. Negligence

Jeno ascribed moderate negligence to the violation. He considered mitigating, the fact that Granite Rock had properly trained the miners in identification of fall hazards and proper use of fall protection equipment, provided them with access to portable ladders, lanyards and harnesses, and had permitted them to build a safe work platform two months prior to the instant violations. Aggravating factors that Jeno considered were absence of ladders in the work area, lack of supervisory oversight to ensure safety compliance, lack of a job task analysis, and Granite Rock's overall passive approach to monitoring compliance with its safety policies and procedures. It is evident that Granite Rock knew or should have known that it had an on-going responsibility to ensure that its miners were utilizing the safe means of access that had been provided to them. Accordingly, I find that Granite Rock was moderately negligent.

IV. PENALTY

While the Secretary has proposed total civil penalties in the amount of $3,990.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). *See Sellersburg Stone Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Granite Rock is a large operator. Despite Stipulation No. 5, which purports to address the mine's violations history, but does not, the Secretary has not proffered any evidence of prior violations of the subject standards during the relevant time period. Therefore, I find that Granite Rock's history of violations is neither an aggravating nor mitigating factor. As stipulated by the parties, the total proposed penalty will not affect Respondent's ability to continue in business. Stip. 6. I also find that Granite Rock demonstrated good faith in achieving rapid compliance after notice of the violations. Ex. P-1; Ex. P-4.

The remaining criteria involve consideration of the gravity of the violations and Respondent's negligence in committing them. These factors have been discussed fully, respecting each citation. Therefore, considering my findings as to the six penalty criteria, the penalties are set forth below.

A. Citation No. 6443254

It has been established that this S&S violation of 30 C.F.R. § 56.15005 was highly likely to cause an injury that could reasonably be expected to be fatal, that two persons were affected, that Granite Rock was moderately negligent, and that it was timely abated. Applying the civil penalty criteria, I find that a penalty of $1,995.00, as proposed by the Secretary, is appropriate.

B. Citation No. 6443255

It has been established that this S&S violation of 30 C.F.R. § 56.11001 was highly likely to cause an injury that could reasonably be expected to be fatal, that two persons were affected, that Granite Rock was moderately negligent, and that it was timely abated. Applying the civil penalty criteria, I find that a penalty of $1,995.00, as proposed by the Secretary, is appropriate.

ORDER

WHEREFORE, Citation Nos. 6443254 and 6443255 are **AFFIRMED**, as issued, and it is **ORDERED** that Respondent **PAY** a civil penalty of $3,990.00 within 30 days of this decision. Accordingly, this case is **DISMISSED**.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

Larry Larson, CLR, U.S. Department of Labor, MSHA, 991 Nut Tree Road, 2nd Floor, Vacaville, CA 95687

Jan Coplick, Esq., U.S. Department of Labor, Office of the Solicitor, 90 7th Street, Suite 3-700, San Francisco, CA 9410

Kevin Jeffery, Esq., Assistant General Counsel, Granite Rock Company, 350 Technology Drive, Watsonville, CA 95076

/cjw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

January 27, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 2011-34 A.C. No. 12-02394-233729
v.	:	
BLACK PANTHER MINING, LLC, Respondent	:	Mine: Oaktown Fuels Mine No. 1

DECISION AND ORDER

Appearances: Edward V. Hartman, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Petitioner

Drew Miroff, Esq., Ice Miller, Indianapolis, Indiana for Respondent

Before: Judge McCarthy

I. Statement of the Case

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Black Panther Mining, LLC ("Black Panther" or "Respondent"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). In my view, as expressed in pre-hearing conference calls, this case should not have been tried, but MSHA refused to back off the unwarrantable failure designation. Accordingly, unnecessary time and resources were devoted to this litigation.

A single section 104(d)(1) Order dated August 17, 2010 remains at issue.[1] The condition

[1] The parties made a joint motion on the record to settle the two other citations in Docket No. Lake 2011-34. The parties agreed that Order No. 8429032 alleging a section 104(d)(1) unwarrantable failure to comply with 30 C.F.R. 75.361(a) would be modified to a section 104(a) citation, with moderate negligence and a reduced penalty of $460. The parties further agreed that section 104(d) Order No. 8429035 would be modified to a section 104(d)(1) citation with a statutory minimum penalty of $2,000. I have considered the representations presented and

(continued...)

or practice alleged to be a significant and substantial (S&S) and an unwarrantable failure violation of 30 C.F.R. § 75.1725(c)[2] is as follows:

> Repairs or maintenance were being performed on the 2 Main South belt at crosscut number 2 without power removed from the drive motors and blocked against motion. The maintenance chief was observed with a chain hoist on two separate sections of belt frame ratcheting them together. Drive motors number 1 and number 2 were observed plugged into the power center at crosscut number 1 with the emergency stop switch for motor number 2 engaged. This violation is an unwarrantable failure to comply with a mandatory safety standard, and the maintenance chief has engaged in aggravated conduct constituting more than ordinary negligence.

Pet. Ex. 1. The gravity is alleged to be reasonably likely to result in an injury or illness that could be reasonably be expected to result in lost workdays or restricted duty, with one person affected. Negligence is alleged to be high. The proposed penalty is $2,000, the statutory minimum under section 110(a)(3)(A). The Order was terminated when the work on the conveyor belt was completed before the situation could be addressed.

Respondent admits operator, mine, authorized representative, and interstate commerce status, but denies the violation and concomitant gravity, negligence, S&S, and unwarrantable failure findings and the validity of the civil penalty.

An evidentiary hearing was held in Indianapolis, Indiana on November 7, 2011, after repeated conference calls failed to settle this matter. The parties introduced testimony and documentary evidence, and witnesses were sequestered. At the conclusion of the hearing, based on the credible testimony from each of the Respondent's witnesses and the inability of MSHA Inspector, Anthony DiLorenzo, to testify from firsthand knowledge as to how the power system worked, I granted a "directed verdict" vacating the citation. I found that the power was turned

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[1](...continued)
conclude that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly, the joint motion to approve partial settlement in Docket No. Lake 2011-34 is approved. See Tr. Tr. 25-26.

[2] 30 CFR 75.1725(c) provides:

> Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion except where machinery motion is necessary to make adjustments.

off and the machinery was blocked against motion when Respondent's maintenance chief, John Vennard, made the repairs at issue. Tr. 212.

On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the post-hearing briefs, I make the following:

II. Factual Background

A. Stipulated Facts

The parties stipulated to the following facts.

1. The Federal Mine Safety and Health Review Commission has jurisdiction over this proceeding.

2. At all times relevant to these proceedings, Black Panther Mining, LLC's operations affected interstate commerce.

3. At all times relevant to these proceedings, Black Panther Mining, LLC is owned and operated by the Oaktown Fuels Mine No. 1, which is located in Knox County, Indiana.

4. The Oaktown Fuels Mine No. 1 is an underground mine for the extraction of bituminous coal.

5. Black Panther Mining, LLC began underground mining at the Oaktown Fuels Mine No. 1 in April of 2007.

6. If the citation and penalty proposed in this case are upheld, Black Panther Mining, LLC's ability to continue operations would not be threatened.

7. Citation No. 8426631, which is the order at issue, was issued to Black Panther Mining, LLC on August 17, 2010, pursuant to section 104(d) of the Federal Mine Safety and Health Act of 1977.

8. The subject citation was properly served upon an agent of Black Panther Mining, LLC.

9. Maintenance chief, John Vennard, was performing maintenance on the 2 main south belt assembly at crosscut number 2 on August 17, 2010.

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[3] In resolving conflicts in testimony, I have taken into consideration the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, and consistency or lack thereof within the testimony of witnesses and between the testimony of witnesses.

10. At the time Mr. Vennard was performing maintenance on the 2 main south belt assembly, the belt's drive motors number 1 and number 2 were plugged into the power center at crosscut number 1.

11. The emergency stop switch at the power center for drive motor number 2 was engaged.

12. The emergency stop switch at the power center for drive motor number 1 was not engaged.

B. The Inspection

1. MSHA's Witness

On August 17, 2010, MSHA's certified mine inspector, Anthony DiLorenzo,[4] visited Respondent's mine with a trainee (T. Blair)[5] to conduct an EO2 spot ventilation inspection. Tr. 37, 41, 44; P. Ex. 2, p. 2. DiLorenzo and Blair were accompanied underground by Respondent's safety director, Matt Dowell. DiLorenzo made contemporaneous notes during the inspection, but otherwise I find that DiLorenzo's testimony and recollection was not very reliable. Tr. 43, 47, 194; P. Ex. 2.

DiLorenzo spent the majority of the inspection at the active section (MMU-003-004) of 2 Main South in an area where the roof had recently fallen near cross cut 16. Thereafter, DiLorenzo, Blair, and Respondent's safety technician trainee, Bobby Cox,[6] walked the 2 Main South belt from the tail piece out-by the belt drive, checking ventilation stoppings and air flow, and looking for coal dust or rock dust on surfaces. Tr. 42-43, 194; P. Ex. 2, pp. 1 and 3. DiLorenzo's notes reflect the belt was down at that time. P. Ex. 2, p. 7.

DiLorenzo initially testified that while walking the belt he saw Respondent's maintenance chief, John Vennard, shift maintenance foreman, Jason York, and unit mechanic, Greg Simmons, ratcheting two pieces of the belt frame back together, with a standard chain hoist or come-along, in order to slide a cotter pin back into the structure. According to DiLorenzo, they were working both sides of the belt. Tr. 44-46, 96. DiLorenzo's notes indicate that Vennard was performing

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[4] DiLorenzo was an acting field office supervisor at the time. He started with MSHA in July 2007, became an authorized representative in August of 2008, and had slightly over 4 ½ years of previous mining experience. Tr. 37-38.

[5] Blair did not testify to corroborate the testimony of DiLorenzo, the Secretary's sole witness.

[6] Cox did not testify, but was still employed by Respondent. Tr. 199. Dowell testified that Respondent spoke to Cox before trial, but Cox purportedly could not recall anything about the citation at issue. Tr. 200.

the work and York and Simmons were standing in the area watching. P. Ex. 2, p. 9; *but see id.* at 11 noting "men working on belt." Dowell was apparently still in the travel way entry when DiLorenzo made this observation. Tr. 46-47. I do not credit this testimony from DiLorenzo since he distanced himself from this testimony in subsequent testimony and the preponderance of the credible evidence indicates that Vennard and Simmons were performing the work and York was stationed at the belt master, as explained below.

DiLorenzo testified with uncertainty that he *probably* walked within a yard of where Vennard was performing the work and *probably* asked how are you doing, what's going on, but could not recall whether he had any conversation with or made eye contact with Vennard before heading towards the power center, as described below. Tr. 91-92. DiLorenzo observed that the chain hoist was attached to two separate sections of the belt stretcher (rail) and Vennard had his arm on the inside of the stretcher between the structure and the belt and was ratcheting the two sections of the rail together from outside the structure in order to insert a cotter pin that was missing. Tr. 55-56, 93-94, 95; see R. Ex. 7.

DiLorenzo never saw anyone in contact with the belt. Tr. 96. According to DiLorenzo, York and Simmons were just observing, standing there waiting. Tr. 55-56. Based on his experience performing similar maintenance, DiLorenzo testified that it would take less than 30 minutes to ratchet two frames back together. Tr. 57.

Subsequently, DiLorenzo testified that York and Simmons were just in the area and he did not see them perform any actual work. Tr. 57. On subsequent questioning from the Court during cross examination as to which side of the belt he saw York on, DiLorenzo testified that at one point in time York was on the off side of the belt (i.e., opposite the belt master), but "they were not just all standing in one location, they were moving around to different forms." Tr. 88-89. I do not credit this testimony about York's location. Rather, I find consistent with the credible testimony of each of Respondent's witnesses, as set forth below, that Vennard posted York at the belt master and York did not leave that area. Thereafter, on further cross, DiLorenzo conceded that he never saw York or Simmons perform any work on the structure. Tr. 112.

DiLorenzo testified that he observed Vennard for about one minute, more or less, and recalled that Vennard's arm was inside the belt frame (over the structure) for about 10-15 seconds. Tr. 60, 92, 103. DiLorenzo testified that if the belt started while Vennard's arm was inside the frame, the chain hoist possibly could have unlatched and whipped around striking Vennard, or Vennard could have been hit by the chain structure or the belt itself, likely causing cuts or lacerations to his arm. Tr. 59.

DiLorenzo then continued walking out-by toward the belt drive and then walked toward the power center in cross cut 1. Tr. 48. He could not recall whether anyone was at the belt master when he walked to the power center. Tr. 58. He testified that the belt master in 2 Main South belt was about 120-150 feet away from the power center, which was located in cross cut 1 on the opposite side of the secondary escapeway. Tr. 58; *see* R. Ex. 8. DiLorenzo further testified that as he walked down the 2 Main South belt, he should have seen anyone who was posted at the belt master and would have annotated that in his notes. Tr. 58-59. His notes do not

reflect that anyone was stationed at the belt master. P. Ex. 2. I give little weight to this testimony from DiLorenzo because his recollection was not impressive, particularly concerning where York was located, and the Secretary adduced no testimony concerning DiLorenzo's practice, customary or otherwise, with regard to taking notes.

Dowell rejoined DiLorenzo at the power center. Tr. 49, 110. At that location, DiLorenzo observed that the power cable for drive motor no. 1 and 2 were coupled into the power center, and the emergency stop (e-stop) for drive motor no. 2 was engaged, i.e., physically depressed to open the circuit, but the e-stop for drive motor no. 1 was not engaged. The belt was not running. Tr. 48, 80-81; see R. Ex. 1 and 2.[7] Dowell confirmed that the power center circuit was open as one of the e-stops was engaged, and the manual off switch and e-stop at the belt master were also engaged. Tr. 203-05. Consistent with his training and experience, DiLorenzo testified that "power off" meant that the circuit breaker is open and the power couplings are removed from the power source. Tr. 49, 57, 65, 116.

DiLorenzo rhetorically asked Dowell, "Am I seeing this correctly" or "Is this really what it appears to be?" DiLorenzo testified that it was obvious that the power cables were still coupled into the power center that was supplying power to the drive motors and only one circuit breaker was open. Tr. 50, 65. He could not recall what Dowell said, if anything, in response, but opined that Dowell's facial expressions conveyed displeasure. Tr. 50. Dowell could not recall indicating any displeasure and does not recall arguing with DiLorenzo at this point. Tr. 206. When repeatedly asked by the Court what specific facial expressions he observed, DiLorenzo could offer nothing more than the opinion that Dowell was tight lipped. Tr. 51-53. DiLorenzo testified that he remained at the power center about 10-15 minutes. Tr. 92.

DiLorenzo and Dowell then traveled from the power center back towards the belt line, which was about 90 feet away, where Vennard, York, and Simmons were stationed along the belt. DiLorenzo testified that he intended to remove all miners from the area until the power to the belt drive motors was turned off according to DiLorenzo's understanding of MSHA policy. By the time DiLorenzo arrived, however, the work had been completed.

The whole sequence of events lasted less than 10 minutes, but DiLorenzo testified in response to a leading question that the condition need not last a long period of time for an injury to occur because it would take just several seconds for someone to turn the belt back on. Tr. 55, 66. DiLorenzo testified that Vennard was not in a position to prevent anyone from starting the drive motor no. 1 at the belt master. Tr. 59.

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[7] On cross examination, DiLorenzo conceded that if the e-stop was engaged on one drive but not on the other drive, the belt would not move. He further testified that if the belt was running and one of the e-stops was engaged, the belt would shut off. Tr. 80. DiLorenzo refused to concede, however, that if one attempted to restart the belt with only one circuit breaker open, the belt would not move. Rather, DiLorenzo opined, without verification or testing, that the belt could move because there was still one closed circuit to the second drive motor. Tr. 81-82, 105.

DiLorenzo testified that he spoke with Dowell and Vennard about the alleged violative practice and the potential action that he would be taking after checking his references. P. Ex. 2, p. 12; Tr. at 67-69, 97. DiLorenzo further testified that as he was leaving to return to the surface, the operator restarted the 2 Main South belt, but DiLorenzo did not see how this was done. Tr. 73.

Once DiLorenzo returned to the surface, he reviewed the CFR and any PIBs, PILs or PPLs applicable to the standard, including P. Exs. 3 and 5. Tr. 69-70; P. Ex. 2, p. 12. P. Ex. 3 is Program Policy Letter No. PO8-V-01, effective March 18, 2008 through March 31, 2010. That PPL had expired at the time the instant Order was written on August 17, 2010. P. Ex. 4 is Program Policy Letter No. P11-V-01, effective February 8, 2011 through March 31, 2013, which post-dated the Order and clarified PPL PO8-V-01 in a manner not material here.

PPL PO8-V-01, MSHA's interpretation of the cited regulation (Tr. 76), provides in relevant part, as follows:

> **Purpose**
>
> This Program Policy Letter covers the MSHA policy concerning the requirements of Section 75.1725(c), Title 30 of the Code of Federal Regulations (CFR), in order to prevent injuries while machinery repairs or maintenance are performed. This policy letter addresses the meaning of 30 C.F.R. § 75.1725(c), and identifies a number of methods for complying with the standard.
>
> **Policy**
>
> Section 75.1725(c) provides that "[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments."
>
> "Machinery" includes hydraulic jacks or cylinders, belt conveyors, longwall conveyors, and other machinery used in coal mines. "Repair" means to fix, mend, or restore to good working order. "Maintenance" means the labor of keeping machinery in good working order and includes clean-up, clearing jammed material or conducting examinations on or in close proximity to machinery.
>
> Methods to comply with this standard to prevent inadvertent or unexpected motion include:
>
> 1. Opening the circuit breaker for the affected machinery, provided no energized parts or conductors are exposed, and placing the run selector switch for startup of the machinery in the "off" position. . . .
> 2. Opening the circuit breaker at the power center that supplies

power for the affected machinery (30 C.F.R. § 75.900) and disengaging the power cable coupler that supplies power to the machinery (30 C.F.R. § 75.903).

3. Opening a manual visible disconnect switch, either within the circuit or onboard the machinery, (30 C.F.R. § 75.903) and securing the switch against re-energization. A control circuit start-stop switch does not constitute a manual disconnect.
4. In cases such as steeply inclined belt conveyors and suspended loads, when removing the power alone will not ensure against unintentional or inadvertent movement, the machinery shall be physically blocked, in addition to removing the power by one of the three methods described above. Physical blocking may be achieved by the use of such devices as bars, chocks, or clamps.[8]

Other methods may be appropriate in particular situations to prevent unintentional or inadvertent movement. What method(s) is appropriate depends upon the circumstances and type of machinery. The critical determination is whether the method(s) used would effectively prevent motion. . . .

In addition, it is important to emphasize that restoring power prematurely while repairs or maintenance are ongoing places a miner performing that work in harm's way. Operators must prevent inattentive restarting and assure that repairs or maintenance have ceased before power is restored to the machinery. Preventive measures operators can take include locking and tagging out, clearance checks, or visible or audible alarms with built-in time delays before restart to warn the miner(s) performing the work so power will not be restored without the miner's knowledge.

See P. Ex. 3, pp. 1-2.

DiLorenzo conceded that the standard does not require lock out and tag out and there were other methods to comply. Tr. 98, 111. On the other hand, DiLorenzo testified that the belt was electrically powered equipment because it receives power from two electric drive motors at the power center, which turns gears and pulleys to move the conveyor belt. However, he did not write a violation under 30 C.F.R. 75.511 because mechanical work was being performed on the belt, not electrical work on the belt drive motors. Tr. 120-21. In response to another leading question on direct, DiLorenzo testified that Respondent was working on a belt frame that

[8] DiLorenzo testified on cross that both paragraphs nos. 3 and 4 were inapplicable here because the belt drive was not equipped with a manual, visible, disconnect switch (paragraph 3) and the record fails to establish that the belt being repaired was a steeply inclined belt conveyor (paragraph no. 4). Tr. 83.

contained a belt that actually could be moved by drive motors. Tr. 122. He further testified that if someone turned the power switch at the belt master to the "on" position, that would cause the motor on the closed circuit to run. Tr. 123.

After reviewing his references, DiLorenzo wrote the instant Order and gave it to Dowell and Respondent's operations manager, Brad Rigsby, while explaining why he had written the Order. Tr. 7-71; P. Ex. 2, p. 12. Di Lorenzo conceded that he did not know or inquire about what Black Panther's training was concerning the restarting of belts that had stopped. Tr. 99, 100. DiLorenzo testified that even if he knew that Black Panther miners were trained not to restart a belt until they knew why it was stopped, he still would have written the unwarrantable failure order. In his view, Vennard, York, and Simmons just happened to be close to the belt master, but there could be other situations where work was performed farther away from the belt master where somebody could walk over and turn the untagged belt master switches on, despite training not to do so in situations when they did not know why the belt was down. DiLorenzo explained that not everyone does what they are trained to do. Tr. 100-01.

DiLorenzo testified that he designated the violation as S&S because an injury was reasonably likely to occur. DiLorenzo arrived at this conclusion based on the fact that Vennard's arm was inside the frame between the belt structure and the belt when power was not turned off, and nothing prevented the 2 Main South belt from being turned on, such as by a miner turning the switch at the belt master from "off" to "manual" or to "auto" (automatic) at the belt master. Tr. 60-61, 72.

In designating the violation as an unwarrantable failure, DiLorenzo at first described Vennard's conduct as intentional and "extensive" because he was the maintenance chief and an agent of the operator, who had performed maintenance on equipment without the power being shut off and in front of subordinates.[9] DiLorenzo also considered the fact that Vennard had previously given DiLorenzo the impression that he knew or should have known the regulations, including the fact that one could not perform maintenance on equipment without the power being off. Tr. 61, 64-65, 108-09. In this regard, DiLorenzo testified that around June or July of 2010, he sat in on a safety talk that Vennard gave to third-shift personnel about turning power off and locking and tagging out machinery or equipment during maintenance or repair work. DiLorenzo described this talk as one of the best references to lock out/tag out that he had ever heard. Tr. 62-63, 104.[10] DiLorenzo testified that during the talk, he recalled Vennard describing "power off" as being removed from the power source and locked out, although he did not recall Vennard speaking about belts, just equipment generally. Tr. 63, 104. DiLorenzo was not aware of any prior violations of 30 C.F.R. 75.1725(c) at this mine, nor was he aware of any notification by

[9] On cross, however, DiLorenzo testified that he did not believe that Vennard was intentionally violating the standard. Tr. 111.

[10] DiLorenzo conceded that he left the safety chat with the impression that Vennard knew his stuff about locking and tagging out, and about teaching his employees the proper way to do so in order to prevent unintentional or inadvertent movement, when necessary. Tr. 104.

MSHA that Respondent needed to make greater efforts to comply with the standard. Tr. 66-67, 109-10.

On cross examination, DiLorenzo testified that in his opinion, paragraph no. 2 of the expired PPL was not complied with because only one of two circuit breakers was open and it was his understanding that if one of the two drive motors was engaged, the belt could still move. Tr. 77, 102.[11] DiLorenzo testified that when leaving for the surface, he observed the Respondent attempt to restart the 2 Main South belt after the repairs were made without closing the circuit breaker that was already open, and the "belt did attempt to start and move, shut down." Tr. 77-78, 102. DiLorenzo did not explain what attempt to start or move meant. I give no weight to this testimony as it was little more than assumption given DiLorenzo's previous testimony that he did not see the belt or how the belt was restarted when he left the power center, and he did not inquire as to how the belt master or power center worked. Tr. 73, 116-17. In this regard, there is no evidence that DiLorenzo ever asked anyone from Respondent how the power center or belt master or any switches or drive motors at those locations actually operated. In fact, DiLorenzo conceded that he never investigated how the belt master worked, but agreed that if the belt master switch was off and the e-stop was engaged, the e-stop would have to be disengaged and the master switch turned on before the belt could start moving. Tr. 101-02. Thereafter, he testified that engaging the e-stop on the belt master opens the circuit and guards against movement, but does not assure that movement cannot be resumed. Tr. 105. DiLorenzo never tested his theory that unless the power cables were unplugged, the belt could start up because the cables were still energized.

With regard to paragraph no. 1 of the expired PPL, DiLorenzo testified that such method was not complied with because the affected machinery was the 2 Main South belt, which had two different motors, but only one of those motors had the circuit breaker open. DiLorenzo disputed Respondent's position that both motors needed to be engaged for the belt to move. Tr. 84. As noted above, DiLorenzo testified that Respondent attempted to start the 2 Main South belt with only one of the circuit breakers closed while he was present and the belt did move, "attempted to start,"[12] but did not have enough power or torque to turn the belt with only one drive motor running. I have declined to credit this testimony. I note that DiLorenzo did not see who attempted to start the belt from the belt master with only one circuit breaker open at the power source while he purportedly stood at the power center with Dowell where the catheads were

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[11] The option in paragraph 2 requires "[o]pening the circuit breaker at the power center that supplies power for the affected machinery (30 C.F.R. § 75.900) and disengaging the power cable coupler that supplies power to the machinery (30 C.F.R. § 75.903) (underscore added). DiLorenzo did not address the second part of the conjunctive guideline, but there is no dispute that the power cable couplers were not disengaged.

[12] It is not clear that DiLorenzo could see or was looking at the belt when standing at the power center. See R. Ex. 8. He certainly could not see the belt master. Tr. 114. On questioning from the Court, he conceded that he assumed that somebody was attempting to start the belt at the belt master. Tr. 116-17.

engaged. Tr. 85, 112 . DiLorenzo testified, without detail as to personal observation, that the second time Black Panther attempted to start the belt, they closed both circuits to drive motor 1 and 2 and the belt ran normally. Tr. 113-14. In short, I find DiLorenzo's testimony too vague and imprecise to establish that belt actually moved when Respondent "attempted" to restart it as DiLorenzo was headed for the surface. On redirect, DiLorenzo answered affirmatively in response to the following leading question from counsel for the Secretary: "My question was basically getting to the point that while you were at the power center, one of the circuits to belt number 2, belt drive motor number 2, was still open, and the circuit for belt drive number 1 was closed when you were at the power center and you saw the belt move?" Tr. 115. In addition, DiLorenzo testified that to the best of his recollection, he *believed* that Vennard closed the circuit at the power center by resetting the circuit breaker on that drive motor (Tr. 115), but York contradicted DiLorenzo. 179-180. I credit York, who credibly testified on questioning from the Court that once he was cleared by Vennard to start the belt, he went to the power center and released the e-stop for the no. 2 drive motor and then went back to the belt master, released the e-stop, turned the power on, and started the belt. See Tr. 179-80.

I also note that DiLorenzo never went to the belt master and did not know whether the belt master was in the "on" or "off" position or whether the e-stop was engaged, which would open the circuit for the belt master and guard against belt movement. DiLorenzo insisted that someone could reset the e-stop and turn the belt back on. Tr. 86-88, 105. He conceded, however, that the belt master controls whether the belt moves or not, and if the e-stop is on and the belt master control switch is off, the belt will not move, unless someone turns on the switch. Tr. 88, 90.

2. Respondent's Witnesses

Respondent's witnesses conveyed a slightly different version of events surrounding the inspection. John Vennard has been Respondent's maintenance chief since June 2006 after working in several maintenance positions since 2001, including a two-year stint as maintenance foreman. Tr. 133-34. Vennard maintains all electrical and mechanical aspects of underground coal mine equipment. Three shift foreman, including York, and 35 electricians, report to Vennard. Vennard teaches an 8-hour refresher training course for all mechanics, holds an electrical card, and performs on-the-job training, whenever necessary. Tr. 135.

Vennard testified that on August 17, 2010, he was leaving a continuous miner unit that was performing room and pillar mining when a belt examiner flagged him down because a belt was spilling coal. Tr. 137. Vennard examined the spillage area, walked to the belt master, turned the power switch from "auto" to "off", engaged the e-stop button, and then went to the power center and hit the e-stop for one of the drive motors, but did not remember which one. Tr. 138-39, 140.[13] On his way back to the spillage area, Vennard encountered section foreman York

[13] On cross, based on his experience reading MSHA PPLs, Vennard was asked for his understanding of how MSHA defines power off. He opined that power off meant either the circuit breaker was open or the power to that circuit was open. He further opined that if you are (continued...)

and unit mechanic Simmons. Vennard instructed York to go to the belt master until Vennard flagged him to turn the belt back on. Tr. 138-39, 143.[14]

After taking said precautions, Vennard then went to the spillage area to put the pin back in the belt structure. Vennard could not perform the task alone because the belt was loaded with coal and Vennard could not pick the structure up himself and replace the pin. Tr. 143. So Simmons went to the man-trip to retrieve a come-along (ratchet hoist). Vennard and Simmons then put the come-along on the belt structure, pulled the structure back together, and put the pin in it. There was no electrical work involved and Vennard testified that it was not possible to come in contact with the belt during the task, which was completed about 10-15 minutes after Vennard left the power center.[15]

Vennard testified that York did not assist with the repair task and never left the belt master. Tr. 145. Dowell testified that he never saw York leave the belt master where they conversed. Tr. 201-02. York confirmed that Vennard explained to him that he had shut the belt down to re-pin the belt structure, that Vennard instructed York to stay at the belt until Vennard completed his work so no one could try to turn the belt on, that the whole job lasted about 5-10 minutes, and that York never left the belt master until he was cleared to start the belt. Tr. 178, 181-82, 188.[16]

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[13](...continued)
required to have a visual disconnect, one can remove the catheads and put a lock and tag on them, but power off is somewhat of a gray area. Tr. 164-65.

[14] York corroborated Vennard's testimony that Vennard instructed York to post at the belt master until Vennard completed his work on the belt so the belt could be restarted. Tr. 177. York could see Vennard from the belt master, but not from the power center. Tr. 184. York testified that he has been posted at the belt master on other occasions, such as setting belt drives on new installations, and from that vantage point he has been able to observe the work being performed on various occasions. Tr. 185.

[15] Vennard testified that if he had been performing electrical work on the cables or at the power center, he would have used a physical log out and tag out mechanism. Tr. 157; cf. 163. Vennard further testified that he trained his shop that if the miners had any question in their mind as to whether lock out tag out applied or whether a piece of machinery could be turned on and could move or experience a power surge, then they should lock out and tag out and remove the cables. Tr. 169.

[16] With regard to training, Vennard testified that every belt drive has a mine phone and before starting a belt back up, a maintenance mechanic or foreman must call and find out why the belt is stopped. Tr. 149. Safety Director Dowell corroborated this testimony. Tr. 205. Typically, the miner who shuts the belt down is the miner who gives the order to start the belt back up. Tr. 151.

After completing the repair, Vennard proceeded down the belt line toward the belt master and told York to start the belt master, and then he turned right at crosscut one (towards the power center) and saw Inspector DiLorenzo with Dowell in the entry at the power center. Tr. 146-49, 161-62.[17] Vennard did not instruct DiLorenzo or Dowell to disengage the e-stop at the power center and does not recall when the belt started back up or where he was when the belt started back up, although he testified that he would not have left the area if the belt did not start back up. Tr. 162-63. Vennard could not recall who released the e-stop at the power center, which was necessary to start the belt back up. Tr. 161. On redirect, Vennard again could not recall whether he disengaged the e-stop at the power center. Tr. 170 On further questioning from the Court, he could not recall any details about the belt being started back up. Tr. 172.

York testified that once he was cleared by Vennard to start the belt, he went to the power center and released the e-stop for the no. 2 drive motor and then went back to the belt master, released the e-stop, turned the power on, and started the belt. Tr. 179-80. York did not have any conversations with inspector DiLorenzo and does not recall seeing him, although York spoke with Dowell to ask what was going at some point when DiLorenzo was not with Dowell. Tr. 180, 188.

Vennard testified that the belts shuts off if the power is turned off or the e-stop button is engaged, and with either action, the belt does not move. Tr. 140. Vennard further testified that he was familiar with 30 C.F.R. 75.1725(c) and believed that his actions complied with the standard by turning the power off and blocking the belt from motion. Moreover, there were no moving parts and Vennard did not come in contact with the belt or enter any pinch point area. Tr. 151-52.

In response to questioning from the Court, Vennard testified that it was not necessary to engage both e-stops at the power center because they feed through a series circuit and pushing one e-stop will shut down the circuit, which is monitored at the belt master and prevents the belt from moving. Tr. 142, 155.[18] Vennard conceded that the power system was designed to run on one motor, and in such case, the e-stop for that motor was controlling, but when both motors were being used, as in this case, one e-stop controls both motors. Tr. 155. When asked on cross why he stationed York at the belt master if engagement of one e-stop at the power center would ensure that the belt would not move, Vennard testified, "I think I positioned him there as much as not to turn it on as when I flagged him to turn it on. So we could get the belt back up and running." Tr. 160. "He was positioned there as much as not to let the belt start, as to get the belt started as fast

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[17] Initially, on direct,Vennard did not remember where he went after telling York to restart the belt. Tr. 147.

[18] Vennard did not explain this to inspector DiLorenzo and DiLorenzo did not ask. In fact, Vennard testified, contrary to DiLorenzo's suggestion otherwise (Tr. 91-92), that DiLorenzo never spoke to Vennard while underground, and Vennard did not see DiLorenzo until DiLorenzo was at the power center when Respondent began the process of starting the belt back up. Tr. 142. I credit this testimony of Vennard over the uncertain testimony of DiLorenzo cited above.

as we could." Tr. 165-66. Thereafter on cross, Vennard testified that he did not need to position York anywhere, but it was a hectic, moment and he was in a hurry to get the belt back up and running. Tr. 166, 169-170.[19] On further aggressive cross examination concerning whether he was in a hurry and positioned someone there to protect him, but did not follow the standard, Vennard held tough and testified that he complied with the standard, which he acknowledged on redirect was designed to prevent motion or movement of equipment (Tr. 170), by turning the power off at the power center and removing power from the belt. Tr. 166-67.

On further questioning from the Court, Vennard testified that the belt was blocked against motion during his repairs because the power was off and the belt could not move. Tr. 172. He testified that if the power had been on, the belt still would have been running. Tr. 173. He further acknowledged a difference between "power off" and "blocking against motion" and volunteered that one could actually put a belt block or tie on a belt to keep it from rolling, but such precaution was unnecessary in the circumstances of this case based on the type of machinery since the belt was loaded and was located on a flat surface without incline, and was not going to move with power off. Tr. 171-72, 174. The Secretary offered no probative evidence or persuasive argument to the contrary.

Vennard also testified that it was not necessary to decouple the power cables for the two drive motors at the power source because there were three open circuits, the power was off, and the belt could not start. Tr. 157. Vennard testified and Dowell confirmed that in order for the belt to start moving again, one would have to release the e-stop at the power center, release the e-stop at the belt master, and then turn the switch back to the "on" position at the belt master. Tr. 152, 208. He further testified that all three of these things needed to happen for the belt to move in any fashion or start back up. In fact, Vennard testified that he had tested this before and confirmed that such was the case. Tr. 153. Dowell also testified that in the past he had tried to start the belt when the e-stop to one motor at the power center was engaged and the belt would not move or even attempt to start up. Tr. 207. On cross, Dowell further opined that Vennard went above and beyond what 30 C.F.R. 75.1725(c) required by opening the circuits at the power center and belt master, turning the power off at the belt master, and stationing York at the belt master. Tr. 208.

On questioning from the Court, Dowell opined that Vennard complied with the first paragraph of PPL PO8-V-01 concerning methods to comply with the standard to prevent inadvertent or unexpected motion, by opening three different circuits. Tr. 209. Dowell further opined that Vennard also complied with the second paragraph of PPL PO8-V-01 because when he hit the e-stop at the power center, he essentially disengaged the power cable couplers that supplied power to the drive motors for the belt because they could not function after the e-stop was engaged. Tr. 211.

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[19] York candidly conceded on cross that Respondent was in a hurry to get the belt back up and running to increase production, but testified on redirect that hurrying does not equate to sidestepping or short-cutting safety requirements. Tr. 188-89.

York also confirmed on cross that Respondent took three steps to ensure that power was off for the belt line, i.e. engaging the e-stop at the power center and the e-stop and power off switch at the belt master. Tr. 183. On cross, York also acknowledged that the belt master controls the starter on the motors, but if the power center circuit is open, which it was, one cannot start the motors. Tr. 182-83.

York further testified that 30 C.F.R. 1725(c) requires equipment to be powered off and blocked from motion, and Respondent's practice under Vennard's leadership was to turn the power switch off and trip the circuit at the power center. Tr. 186. On questioning from the Court, York opined that "power off" meant turning the key on the belt master to "off "(switch off at the belt master) to separate the circuit between the belt master and the starter box at the power center for the motors. York further noted that Vennard took the initiative to engage the e-stop on the belt master as well as the e-stop on one of the two motors that were tied together in a series at the power center. Tr. 189-90. York also opined that "blocked against motion" typically concerned maintenance on mobile equipment or rubber-tired vehicles that have been parked or left idle. He confirmed that the belt on which Vennard was performing repairs could not move if the power was off and the circuit was open at the power center, and that even if the belt master was turned back on, the belt would not move with the e-stops engaged. Tr. 190-91.

Respondent's final witness was Matt Dowell, Respondent's representative throughout the hearing. As noted, Dowell drove the man-trip from the active working section to the end of the belt flight line, while DiLorenzo walked the belt line. Tr. 44. Dowell testified that DiLorenzo asked Dowell to pick him up at the end of the belt flight. Tr. 194. Dowell apparently arrived first (Tr. 200) and parked in the secondary escapeway at cross cut 1 near the power center. Dowell then walked over to the 2 main south belt line, which was down, and then out-by to the belt master, where he spoke to York. York explained to Dowell that guys were working in-by the belt line, where lights were visible, and they were fixing a problem with the belt. Tr. 194-95, 197, 200.

Dowell then heard DiLorenzo holler for him from around the corner at the power center about 90 feet away. When Dowell arrived back at the power center, DiLorenzo asked Dowell how come the belt was not locked and tagged out. Tr. 195, 200.[20] Dowell testified that he did not respond to DiLorenzo's inquiry, but noticed that the motor was engaged for one drive. Then DiLorenzo headed back over through cross cut 1 toward the belt area where Vennard and Simmons were completing their work. Tr. 195-97; see also R. Ex. 8.

Dowell testified that he saw York again when DiLorenzo was questioning Dowell about why the catheads were not locked and tagged out. Tr. 202. I infer this is when York was headed toward the power center to open the circuit after Vennard flagged him following completion of

[20] As noted above, it is undisputed that the cited standard does not require log out and tag out.

the repair work. Dowell testified that DiLorenzo made some notes and then they proceeded outside. Tr. 202.[21]

Dowell further testified that in the man trip on the way out, DiLorenzo was reading through his references and indicated that he had to check some sources once on the surface. Tr. 202. Thereafter, DiLorenzo returned to Dowell's office and indicated that he was issuing a 104(d)(1) Order based on the PPL. Tr. 202. Dowell testified that operations manager Rigsby was present, but Rigsby did not testify. Tr. 203. Dowell testified that he questioned DiLorenzo about the Order, noting that the power was off. According to Dowell, DiLorenzo said that power off meant "locked out and tagged out in this instance." I credit this testimony from Dowell. DiLorenzo's contemporaneous notes confirm that he was viewing the alleged violation as a contravention of lock out and tag out requirements (P. Ex. 2, pp. 10 and 11), although DiLorenzo abandoned this theory at trial. Tr. 98, 111.

3. The "Directed Verdict"

At the close of Respondent's case, I granted Respondent's motion to dismiss (styled by Respondent as a motion for a directed verdict, see Tr. 124 and 212) and vacated the citation. I found, based on the credible testimony from each of Respondent's witnesses and the inability of inspector DiLorenzo to testify from firsthand knowledge as to how the power system worked, that the requirements of 30 CFR 75.1725(c) were complied with because the power was turned off and the belt effectively was blocked against motion under the circumstances. Tr. 212-13. I reaffirm that decision in this written opinion.

As Judge Gill noted when granting a contestant's motion to dismiss at the close of the Secretary's case in a slightly different context in *Clintwood Elkhorn Mining Co.*, 32 FMSHRC 1880, 1881 (Dec. 2010)(ALJ Gill), Fed. R. Civ. P. 52(c) allows the dismissal of a matter at the judge's discretion when a party fails to prove a key element of their case. Fed. R. Civ. P. 52(c) provides:

> If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue. The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

Thus, during a non-jury trial, Rule 52(c) authorizes the court to enter judgment at any time that it is appropriate to make a dispositive finding of fact on the evidence. In *Clifford Meek*

[21] Dowell does not recall seeing Blair or Cox at the power center. Tr. 201. Further, Dowell never saw DiLorenzo speak to Vennard, York or Simmons. Tr. 202.

v. Essroc Corporation, the Commission found that a ruling on a motion for involuntary dismissal under Rule 52(c) was at the judge's discretion and found "no error by the judge and affirm[ed] his procedural determinations." *Clifford Meek v. Essroc Corporation*, 15 FMSHRC 606, 614 (April 1993). In *Sec'y of Labor v. Martin County Coal Corporation and GEO /Environmental*, the Commission found that a judgment on a partial finding was appropriate because the judge had heard the Secretary's entire case. *Sec'y of Labor v. Martin County Coal Corporation and GEO/Environmental*, 28 FMSHRC 247 (May 2006). In addition, the Commission found in *Martin County Coal* that the judge does not need to address every point of evidence. *Id*. The judge must only include findings and conclusions on "material issues of fact [and] law." *Id*., *citing* Fed. R. Civ. P. 52(c).

In this case, I heard all the evidence from both parties before finding at the close of the Respondent's case that the Secretary failed to establish a violation of the cited standard by a preponderance of the evidence. As discussed below, the Secretary failed to prove the key factual elements for her case by a preponderance of the evidence. Specifically, the Secretary failed to establish that a repair was made on the belt structure when the power was on or when the belt was not blocked against motion. All credible evidence is to the contrary.

I credit the testimony of Respondent's witnesses that Vennard examined the spillage area, walked to the belt master, turned the power switch from "auto" to "off", engaged the e-stop button, and then went to the power center and hit the e-stop for one of the drive motors. Although Vennard did not decouple the power cables or catheads at the power center, such method of compliance was unnecessary per the PPL since Vennard had already opened all circuit breakers for the affected machinery and turned the power switch off. In addition, Vennard instructed foreman York to go to the belt master until Vennard flagged him to turn the belt back on. Tr. 138-39, 143. I credit the testimony of Respondent's witnesses that York never left the belt master until he disengaged the e-stop at the power center after being flagged by Vennard to restart the belt once the minor repair was completed. The Secretary made no specific argument as to how the belt was not blocked against motion and her sole witness conceded that a log out and tag out procedure was not required. Further, I credit Vennard's testimony that the belt was effectively blocked against motion because the belt was loaded on a flat surface without incline and could not move with the circuits open and the power off.

In short, I find that Respondent complied with 30 C.F.R. § 75.1725(c). *Cf. Island Creek Coal Company*, 22 FMSHRC 822 (2000). Accordingly, Order No. 8426631 is vacated.

ORDER

For the reasons set forth in note 1 above, the joint motion to approve partial settlement in Docket No. Lake 2011-34 is **APPROVED** under the criteria set forth in Section 110(i) of the Act. Accordingly, Order No. 8429032 alleging a section 104(d)(1) unwarrantable failure to comply with 30 C.F.R. 75.361(a) is modified to a section 104(a) citation, with moderate negligence and a reduced penalty of $460, and Order No. 8429035 is modified to a section 104(d)(1) citation with a statutory minimum penalty of $2,000.

Order No. 8426631 is **VACATED**.

If it has not already done so, within 40 days of the date of this decision, Black Panther Mining, LLC is **ORDERED** to pay a total civil penalty of $2460 for the alleged violations that have been settled. Upon payment of that penalty, this proceeding is **DISMISSED**.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

Distribution: (E-Mail and Certified Mail)

Edward V. Hartman, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, Room 844, Chicago, Illinois 60604

Drew Miroff, Esq., Ice Miller, 1 American Square, Suite 2900, Indianapolis, Indiana 46282

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

January 31, 2012

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	CIVIL PENALTY PROCEEDING Docket No. WEVA 2008-1623
	:	Petitioner,
	:	A.C. No. 46-07908-158162
v.	:	
PINE RIDGE COAL COMPANY, LLC, Respondent.	:	Mine: Big Mountain No. 16

DECISION

Appearances: J. Matthew McCracken, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for Petitioner;

Melissa M. Robinson, Esq., Jackson Kelly, PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Paez

This case is before me upon the Petition for Assessment of Civil Penalty filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (2010) ("Mine Act").[1] Pine Ridge Coal Company, LLC ("Pine Ridge"), contests two orders issued under section 104(d)(2) of the Mine Act arising from an inspection of its Big Mountain No. 16 mine.[2] The parties have stipulated to my jurisdiction over this matter,

[1] In this decision, the following abbreviations are used: "Tr." refers to the hearing transcript; "Ex. J-#" refers to the parties' joint exhibits; "Ex. G-#" refers to the Secretary's exhibits; "Ex. R-#" refers to the Respondent's exhibits; "Sec'y Br." Refers to the Secretary's Post-Hearing Brief; "Resp't Br." refers to the Post-Hearing Brief of Pine Ridge Coal Company; and "Resp't Reply" refers to the Post-Hearing Reply Brief of Pine Ridge Coal Company.

[2] The parties stipulated that Pine Ridge Coal Company owns and operates Big Mountain No. 16, an underground coal mine in West Virginia. (Sec'y Br. 2.) The parties also agree that (continued...)

as well as the Secretary's jurisdiction over Pine Ridge's operations at Big Mountain No. 16. (Sec'y Br. 2.)

I. Statement of the Case

The Secretary filed her petition against Pine Ridge for six alleged violations of her mandatory safety standards. Pine Ridge timely filed its Answer, and thereafter the case was assigned to me. I held the hearing in this matter in Charleston, West Virginia.

At the hearing, the parties reported that they had resolved four of the six alleged violations in this docket.[3] The two remaining violations, Order Nos. 7269756 and 7269757, were issued on May 16, 2007, and assert, respectively, that Pine Ridge violated 30 C.F.R. § 75.370(a)(1) (2006), by breaching its mine ventilation plan through ineffective ventilation controls in the 023 MMU return entry, and 30 C.F.R. § 75.364(b)(2), by failing to conduct an adequate weekly examination of the return entry. The Secretary asserts that both orders involve significant and substantial ("S&S") violations arising from Pine Ridge's unwarrantable failure to comply with the cited mandatory safety standards.[4] The Secretary proposes a civil penalty of $45,000 for each of these violations for a total proposed penalty assessment of $90,000.

The Secretary presented one witness, Gary L. Frampton, the MSHA inspector who issued the orders contested in this case. (Tr. 9–63.) Pine Ridge also presented one witness, Big Mountain No. 16 Mine Superintendent Chris Matkins. (Tr. 64–120.) The parties submitted post-hearing briefs following receipt of the transcript.

II. Issues

The Secretary asserts that the conditions were properly cited as violations and that the S&S and unwarrantable determinations are valid. She further submits that in analyzing whether a violation of an operator's ventilation plan is S&S, the Commission should assume the occurrence of the event the plan was designed to prevent or lessen in severity. Pine Ridge denies that any violations occurred and denies the allegations set forth in the orders. The operator further

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(...continued)
the Secretary's inspector was acting in his official capacity as an authorized representative of the Secretary and that true copies of the orders before me were served on Pine Ridge, as required by the Mine Act. (*Id.*)

[3] The Secretary vacated Order Nos. 7269790 and 7269791, and the parties settled Order Nos. 7269730 and 7262200. (Tr. 5.) I subsequently issued a Decision Approving Partial Settlement on November 19, 2010, resolving these four orders.

[4] The S&S terminology is taken from section 104(d)(1) of the Mine Act, which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d)(1). The unwarrantable failure terminology also derives from section 104(d)(1) of the Mine Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards." *Id.*

contends that if the orders are not vacated then they should be modified to non-S&S section 104(a) citations, inasmuch as the facts do not support the S&S and unwarrantable failure designations.

Accordingly, the following issues are before me: (1) whether the cited conditions were violations of the Secretary's mandatory health and safety standards; (2) whether the Secretary's assertions regarding the gravity and S&S determination are supported by the record; (3) whether the Secretary's determination that the violations constitute unwarrantable failure on the part of Pine Ridge is supported by the record; and (4) whether the proposed civil penalties are appropriate.

For the reasons that follow, Order Nos. 7269756 and 7269757 are hereby AFFIRMED.

III. Findings of Fact

A. Big Mountain No. 16's Ventilation System

Big Mountain No. 16 uses a "blowing" ventilation system to circulate fresh air through its mine. (Tr. 12.) A fan at the mine's surface generates pressure by pushing air from outside into the mine, which circulates through the mine's interior via main tunnels known as "entries" and smaller tunnels that perpendicularly intersect them, which are known as "crosscuts." (*Id.*) Fresh air from the surface, known as "intake air," follows a carefully prescribed route, and various specialized structures, such as regulators, seals, stoppings, and overcasts, ensure that the air follows its designated path. (Ex. R-1.) These structures guide the air by relying on the fundamental fact that air will move from areas of higher pressure to areas with relatively lower pressure. (Tr. 92, 106–07.) As fresh air passes through the mine it collects methane gas, coal dust, and rock dust emitted by the mine itself, as well as in areas where miners are removing coal. (Tr. 12.) The contaminated air, known as "return air," is then directed out of the mine via a separate route. (*Id.*) At the time the orders in this case were issued, Big Mountain No. 16's specific blowing ventilation system used two fans on the surface to circulate fresh air through the mine. One fan blew fresh air along the belt corridor system and ventilated seals on that side of the mine. (*Id.*) The other fan, located at the main portal, ventilated the rest of the mine, including the areas where miners worked. (*Id.*)

An important element of Big Mountain No. 16's ventilation system is the overcast, which ensures proper ventilation at the intersection of entries carrying two different airflows. When properly constructed, an overcast prevents air flowing through one entry from mixing with air flowing through the other entry where they intersect. In the 023 MMU return entry at Big Mountain No. 16, management had constructed three new overcasts. The overcasts were built by erecting two cinder block and mortar walls spanning the width of the intersection and up to a height of approximately five feet, or about half the height of the mine entry. (Tr. 17.) Then, pieces of metal decking, forming what is known as a "Kennedy panel," were laid across the top of the walls. (Tr. 17, 71–72.) The pieces of metal decking were approximately twenty-feet long,

two-feet wide, and six-inches thick. (Tr. 17, 72.) To increase their load-bearing capacity, each piece is hollow with three- to four-inch solid caps at its ends, as well as a solid lip running around its edges, such that when the panel is laid across the walls, it resembles an upside-down canoe. (Tr. 22, 76, 79; Ex. J-5, at 126.) Finally, two other cinder block walls were built on top of them, spanning the width of the entry running perpendicular to the entry blocked by the bottom two walls. (Tr. 70.) The overcasts were finished with a coat of plaster to seal the air and ensure the two air courses remained separate. (Tr. 73.) Walkways were also built over the lower walls covered by the Kennedy panel to allow miners to cross over the top of the overcast. (Tr. 18, 70–71.) In addition to these walkways, each overcast featured a doorway built into its lower wall known as a "man door" to allow miners access to the other entry spanned by the overcast. (Tr. 70–71.)

Once finished, the overcast's lower walls direct air flowing through the entry over the Kennedy panel and through the intersection. The walls on top of the Kennedy panel prevent this air from commingling with air passing perpendicularly through the other entry. In turn, the overcast's upper walls channel the air passing through the intersection by directing it underneath the Kennedy panel. The Kennedy panel and the lower walls prevent this air from mixing with the air flowing above the Kennedy panel.

Maintaining a proper ventilation system is vital to ensuring a safe environment in the mine. Company officials must comply with MSHA regulations regarding proper mine examination to ensure that ventilation problems do not exist. For example, if a fire occurs in one section of the mine and air from the section's return entry is leaking through the overcast into the mine's entry designated as an escapeway, then miners could be forced to escape through smoke-filled airways. (Tr. 32.) Moreover, return air contaminated with rock and coal dust from the working section could leak through a faulty overcast into the intake entry, contributing to the risk of respiratory diseases such as black lung. (*Id.*)

On May 16, 2007, Pine Ridge was operating two mechanized mining units (MMU's), the 022 MMU and the 023 MMU, in different parts of the mine. (Tr. 33.) This case concerns the ventilation controls in these two MMU's, particularly the return air course from the 023 MMU. The fresh air ventilating these sections flowed nearly two-and-a-half miles into the mine from the mine fan blowing at the surface, until reaching a pair of regulators. (Tr. 29.) The regulators split this stream of intake air, turning part of it toward the 023 MMU, and directed the remaining fresh air deeper into the mine toward the 022 MMU. (Tr. 15–16; Ex. R-1.)

After fresh air circulated through the 023 MMU, it exited the section and flowed over a series of three overcasts before reaching the main return entry and exiting the mine. (Ex. R-1.) The first overcast was designed to direct the return air over the mine's main intake entry ventilating the 022 MMU, as well as the 022 MMU's primary escapeway. (Tr. 15–16, 27–28; (Ex. R-1.) From there, the return air flowed past two breaks at Survey Spad Nos. 11464 and 11449, where the operator had constructed stoppings to separate the return air course from two entries intersecting the return. (Tr. 21; Ex. R-1.) From these two survey spads, the return air course

continued over a second overcast spanning the coal conveyor belt entry at survey spad no. 11446. (Tr. 22–23; Ex. R-1.) Finally, the return air passed over a third overcast, which crossed a roadway that all miners working in the mine's active areas used in their daily travels. (Tr. 25, 33; Ex. R-1.) This roadway also served as the secondary escapeway for the 022 MMU. (*Id.*)

At the time these orders were issued on May 16, 2007, the 023 MMU was a new, active section of the mine. Construction of the overcasts was completed by approximately April 29, 2007, in conjunction with the ventilation change that was to circulate fresh air through the section. (Tr. 111; Ex. J-1.) The 023 MMU went into production on May 4, 2007. (Tr. 39–40; Ex. J-1.) On Monday, May 14, 2007, immediately after returning from a week of leave due to the birth of his daughter, Pine Ridge Superintendent Matkins performed a check of the 023 MMU return entry. (Tr. 95–96.) Matkins determined that an adequate volume of air was flowing through the conveyor belt entry and roadway entry. (Tr. 95.) He also determined that the only air leakage in these two entries involved fresh air flowing into the 023 MMU return entry. (*Id.*)

B. Inspection of Big Mountain No. 16 mine

The two disputed orders in this matter were issued on May 16, 2007, during Frampton's routine inspection of the Big Mountain No. 16 mine as a result of his walk-through of the 023 MMU return entry. (Ex. J-1; Ex. J-2.) Frampton's inspection of the return air course proceeded out of the 023 MMU and over the three overcasts spanning three entries: (1) the main intake entry, (2) the conveyor belt entry, and (3) the roadway entry, respectively. As Frampton approached the first overcast, he noticed that the Kennedy panels created holes, which were obvious to him because the panels were not sitting flush on top of the walls. (Tr. 16.) The space between the overcast's lower walls was two to three feet shorter than the length of the metal decking composed of the Kennedy panel, thus allowing the hollow portions on the bottom of the decking to stretch over the walls and into the return entry. (Tr. 18–19, 22, 60.) Ideally, the Kennedy panel would have sat neatly on top of the two lower walls. Instead, they extended about a foot to a foot-and-a-half past each lower wall. Unlike an upside-down bowl that would be sealed if left on a counter, the Kennedy panels were more like upside-down bowls that extended over the edge of a counter, thus creating a gap where air could flow freely.

After discovering the holes in the overcast, Frampton conducted a smoke tube test to determine which direction the leaking return air was flowing. (Tr. 18–19.) He observed air flowing through the holes from the return entry and into the primary intake, towards the 022 MMU working section of the mine. (Tr. 20.) Frampton conducted several more smoke tube tests at the overcast and reached the same results each time. (Tr. 20–21.) He observed that contaminated return air flowing through the return entry was seeping under the Kennedy panel, through the hollow spaces in the decking, and into the intake via the approximately six-inch by two-foot holes between the decking pieces and the wall. (Tr. 78.)

In conducting the smoke tube tests, Frampton also examined the man door in the overcast. (Tr. 21.) The overcast's man door was located in the lower wall facing the 023 MMU, allowing miners access to the intake entry. (Tr. 21; Ex. R-1.) When Frampton opened the door to check his smoke tube results, he observed contaminated air from the 023 MMU return entry flowing into the intake entry and turning immediately right in the direction of the 022 section. (*Id.*) Pine Ridge disputes Frampton's discovery that return air was leaking into the primary intake entry. (Resp't Br. 5; Resp't Reply 3.) Superintendent Matkins asserted at the hearing that, had that been the case, the return airflow out of the 022 MMU would have been reversed from its proper direction. (Tr. 85–86.) Because Matkins's section foreman was required to check the area every four hours, Matkins asserted that his foreman would have detected reversal of the return airflow out of the 022 MMU. (Tr. 86.) Nevertheless, Matkins did not personally investigate the first overcast with Frampton. (Tr. 109–10.) Moreover, Frampton also explained that the regulators splitting the intake air between the 022 MMU and the 023 MMU, as well as the mine's return capacity, contributed to the airflow he witnessed at the primary intake. (Tr. 36–37.) I have noted that Matkins has a bachelors of science in mine engineering from Virginia Tech and approximately sixteen years of experience in the coal mining industry. (Tr. 65–66.) However, I find that Frampton's direct observations of the first overcast, bolstered by his thirty-seven years of experience in underground coal mining up to the level of a compliance officer at a large mine operator, Massey Energy (Tr. 10–11, 43), establish that air was leaking from the 023 MMU return entry into the primary intake entry.

Frampton continued his inspection by walking further down the return toward the next overcast. As Frampton walked by Survey Spad Nos. 11464 and 11449, he passed the area where two entries crossed the 023 MMU return entry.[5] (Ex. R-1.) There, Frampton observed four stoppings, two on his left and two on his right—one pair per entry—that were built to block return air from going into the other entries. (Tr. 21.) Looking at each of stoppings on his left from the return entry, Frampton could see the string of electric lights illuminating a conveyor belt four crosscuts away through holes in the stoppings. (Tr. 21–22; Ex. R-1.) The stoppings should have been airtight, blocking any light from the conveyor belt. (Tr. 37.) Upon closer inspection, Frampton noticed holes of up to eight by six inches in size in the stoppings. (Tr. 22.) Frampton also conducted a smoke tube test near the holes in each of the four stoppings. (*Id.*) He found that air was flowing out of the stoppings on the left toward the surface with the H2 conveyor beltline. (Tr. 23.) As for the stoppings on the right, Frampton found that contaminated air was leaking out of them and deeper into the mine near the H2 conveyor beltline and travelway. (Tr. 23; Ex. R-1.)

Frampton then approached the second overcast in the return, which crossed one of the mine's conveyor belts, the H2 beltline, at Survey Spad No. 11446. (Tr. 22–23.) This overcast was designed to direct contaminated return air over the H2 conveyor beltline. (Tr. 22.) However, Frampton again saw that the metal decking of the Kennedy panel extended beyond the overcast's lower walls by approximately eighteen inches on both sides of the overcast. (*Id.*) Frampton

[5] Survey spads are underground markers corresponding to particular points in a mine and are identified by number.

again found that contaminated air was flowing from the return air entry into the entry containing the H2 conveyor belt. (Tr. 22–23.) Frampton also observed that when the man door was opened, air from the return flowed into the conveyor entry. (Tr. 23–24.) This finding indicated the air pressure was wrong, as fresh air from the beltline should have flowed out of the man door and into the 023 MMU return entry, not the other way around. (*Id.*)

Frampton then continued walking through the return and came upon the third and final overcast, which crossed over a roadway and secondary escapeway for 022 MMU. (Tr. 25.) Frampton noticed the same construction flaw as he had seen in the other two overcasts, namely that the Kennedy panel's metal decking extended well beyond the overcast's walls. (Tr. 26.) The holes in this overcast were obvious to Frampton. (*Id.*) Frampton again found that contaminated air was flowing from the return, through the holes in the overcast, and into the entry containing the roadway. (Tr. 25–26.) When Frampton opened the man door at the overcast, which faced the stream of return air, he determined found that air was again allowed to flow improperly into the roadway entry. (Tr. 25.)

Frampton determined that the holes in these overcasts stemmed from their construction and not from any other factors, such as an impact with mining equipment. (Tr. 40, 60–61.) Frampton explained: "The construction of the overcast was not complete as I saw it." (Tr. 30.) The twenty-foot long metal decking of the overcasts' Kennedy panels extended two to three feet beyond the overcasts' lower walls, which were only seventeen to eighteen feet apart. (Tr. 19, 22, 25–26, 30–32, 60.) Thus, the decking stretched out approximately eighteen inches on either side of the overcasts' lower walls. (Tr. 31.) As a result, Frampton found "too many [holes] . . . to note." (Ex. J-4, at 80.) Similarly, Frampton concluded that the holes in the stoppings also stemmed from their shoddy construction. (Tr. 37, 40.)

However, Pine Ridge Superintendent Matkins asserted that the overcasts were plastered in an attempt to seal them. (Tr. 73.) Nevertheless, Matkins admitted the holes in these overcasts had most likely been present since their construction (Ex. J-5, at 147), which was completed around April 29, 2007, in advance of the ventilation change corresponding with the start of production on the 023 MMU on May 4, 2007.

Based on these findings, Frampton issued Order No. 7269756 for an alleged violation of 30 C.F.R. § 75.370(a)(1) (Tr. 26; Ex. J-1), providing the following verbatim:

> The Approved Mine Ventilation Plan is not being complied with. Return air flow, from the West (023-0 MMU), was found leaking into the primary escape way for the South section (022-0 MMU), into the H2 energized belt conveyor entry, and into the roadway of the H Zone. Energized electrical installations, non-permissible diesel and battery powered equipment were out by the point of the return air flows, entering the belt line and the roadway and the intake entry's. Obvious holes in stopping's, and overcast were present, in addition to numerous places that poorly sealed stopping's contributed to the hazard. When man doors

were opened, the pressures were found to be in reverse of the required air flow directions.

(Ex. J-1.)

Frampton determined that this violation created the highly likely risk of permanently disabling injuries to twenty miners. (Ex. J-1.) Frampton noted that miners in the 022 MMU would be exposed to rock and coal dust leaking into the 022 MMU intake entry and travelway entry, as well as smoke in primary and secondary escapeways in the event of a fire. (Tr. 44.) Accordingly, Frampton designated the alleged violation as S&S. (*Id.*) Additionally, Frampton determined that Pine Ridge had been highly negligent in allowing this allegedly violative condition to exist, conduct which in his view amounted to an unwarrantable failure to comply with 30 C.F.R. § 75.370(a)(1). (Ex. J-1.) Specifically, Frampton asserted that Pine Ridge had allowed the holes in the overcasts and stoppings to persist for twelve days since their construction, despite being obligated to conduct a weekly examination of the return, as well as daily preshift examinations of the conveyer belt and roadway running beneath the second and third overcasts of the 023 MMU return, respectively. (Tr. 40–41, 56–61.)

Because the 023 MMU was required to be inspected once a week, Frampton reviewed the weekly examination book. (Tr. 40; Ex. J-2.) Frampton did not find notations of any of the holes in the overcasts or stoppings. (*Id.*) Based on these observations, Frampton concluded that Pine Ridge violated 30 C.F.R. § 75.364(b)(2) and issued Order No. 7269757, which stated:

> An adequate weekly examination of the one return entry of the Northwest section, (023-0 MMU) has not been conducted and recorded in the weekly examination record book. When examined, return air was found leaking through holes in permanent stopping's, and large holes in recently completed overcasts. Also, when man doors were opened, air flowed into the primary escape way of the South Section (022-0 MMU), H2 belt conveyor entry, and the roadway. These holes would be obvious to the most casual observer. This 023-0 MMU, started producing coal on 5/4/2007.

(Ex. J-2.)

Frampton asserted that the alleged violation created a highly likely risk of permanently disabling injuries to twenty miners. (Ex. J-2.) Accordingly, Frampton designated the alleged violation as S&S for the same reasons as he designated Order No. 7269756 as S&S. (*Id.*) Moreover, based on his perception that the holes in the overcasts were obvious, Frampton determined that Pine Ridge was highly negligent in allowing the condition to exist, thus engaged in conduct which rose to the level of an unwarrantable failure to comply with the Secretary's mandatory safety standard. (Tr. 45; Ex. J-2.)

After Frampton issued the orders in this case, Pine Ridge worked to fix the holes in its ventilation controls. (Tr. 67.) A few hours after the holes had been fixed, Pine Ridge Superintendent Matkins went to meet with Frampton. (Tr. 67, 91.) Matkins had heard that the miners were unable to correct a difference in air pressure that was causing contaminated return air from the 023 MMU to flow improperly through the holes in the overcasts into the other entries. (*Id.*) Matkins met Frampton at the third overcast where it crossed over the roadway. (Tr. 67.) Using a smoke tube, Frampton showed Matkins that air from the 023 MMU return entry was still leaking through the man doors on the overcasts spanning the conveyor belt and roadway entries. (Tr. 67–68, 109.) Matkins, however, did not accompany Frampton to the stoppings or the first overcast at the 022 MMU intake entry. (Tr. 109–10.)

To change the pressure in the return entry and attempt to correct the problem, Matkins made a small adjustment to a return regulator located at a punch-out from the mine to the surface. (Tr. 89–90, 99.) The adjustment lowered the air pressure in the 023 MMU return. (Tr. 113.) Matkins went back to Frampton at the third overcast spanning the roadway, where they determined that the leakage of air from the return entry to the roadway entry had been corrected. (Tr. 90.) As a result, Frampton terminated Order No. 7269756 concerning Pine Ridge's violation of its ventilation plan. (Ex. J-1.)

IV. Principles of Law

A. Operator Liability

Under the Mine Act, operators are strictly liable for violations of the Secretary's mandatory health and safety standards. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008) (citing *Asarco, Inc.*, 8 FMSHRC 1632, 1634–36 (Nov. 1986), *aff'd*, 868 F2d 1195 (10th Cir. 1989)). The actions of an operator's weekly examiner may be imputed to the operator for the purposes of analyzing its negligence. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194–96 (Feb. 1991). To determine whether a particular condition violates a broadly worded standard, the Commission employs the objective "reasonably prudent person" test, which provides:

> [T]he alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

Phelps Dodge Tyrone, Inc., 30 FMSHRC 646, 656 (Aug. 2008) (quoting *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982)).

B. S&S

The Mine Act defines an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is S&S "if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). To establish an S&S violation under *National Gypsum*, the Secretary must prove the four elements of the *Mathies* test:

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3–4 (Jan. 1984) (footnote omitted); *accord Buck Creek Coal v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995) (recognizing wide acceptance of *Mathies* criteria); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving use of *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.* (*U.S. Steel III*), 7 FMSHRC 1125, 1130 (Aug. 1985) (quoting *U.S. Steel Mining Co.* (*U.S. Steel I*), 6 FMSHRC 1573, 1574 (July 1984)).

The third element of *Mathies*, which requires "a reasonable likelihood that the hazard contributed to will result in an injury," is by far the most difficult element of the *Mathies* test. *See U.S. Steel Mining Co.* (*U.S. Steel IV*), 18 FMSHRC 862, 870 (June 1996) (Marks, Comm'r, concurring in result) (observing that during the 12-year period immediately following *Mathies*, over 93% of the Commission's 47 decisions involving an S&S issue concerned the third element). In *U.S. Steel IV*, the Commission held that "the third element of the *Mathies* test does not require the Secretary to prove it was 'more probable than not' an injury would result." 18 FMSHRC at 865 (citation omitted).

In *Ziegler Coal Co.*, the Commission considered the Operator's argument that its violation of allowing contaminated return air to pass over non-permissible equipment, that is, equipment that could ignite coal dust or methane, was not S&S. 15 FMSHRC 949, 952–54 (June 1993). The Commission noted that in a case involving injuries connected to a mine fire, "[t]he reasonable likelihood of an ignition is the necessary precondition to the reasonable likelihood of an injury." *Id.* at 953 (citing *U.S. Steel Mining Co.* (*U.S. Steel II*), 6 FMSHRC 1834, 1836 (Aug. 1984)). The Commission determined that the Judge did not make a finding on the reasonable likelihood of an ignition and remanded the case for further analysis of the third element of *Mathies*. *Id.* at 953–54.

At the same time, the Commission has long held that "[t]he fact that injury [or a condition likely to cause injury] has been avoided in the past or in connection with a particular violation may be 'fortunate, but not determinative.'" *U.S. Steel IV*, 18 FMSHRC at 867 (quoting *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (Feb. 1986)). *See Elk Run Coal Co.*, 27 FMSHRC 899, 906–07 (Dec. 2005) (holding that absence of adverse roof conditions at time of or prior to violation does not preclude establishing S&S violation); *Blue Bayou Sand & Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996) (noting that absence of accidents involving violative equipment does not preclude S&S finding).

The Commission recently reiterated these principles in *Cumberland Coal Resources, LP*, 2011 WL 5517385 (FMSHRC Oct. 5, 2011),[6] and *Musser Engineering, Inc.*, 32 FMSHRC 1257 (Oct. 2010). Citing *Elk Run Coal* and *Blue Bayou Sand & Gravel*, the Commission emphasized that the test under the third prong of *Mathies* is whether the *hazard* fostered by the violation is reasonably likely to cause injury, not whether the violation itself is reasonably likely to cause injury. *Cumberland Coal Res.*, 2011 WL 5517385, at *5; *Musser*, 32 FMSHRC 1280–81.

C. Unwarrantable Failure

The unwarrantable failure terminology derives from section 104(d)(1) of the Mine Act and refers to more serious conduct by an operator in connection with a violation. 30 U.S.C. § 814(d). In *Emery Mining Corp.*, the Commission determined that an unwarrantable failure is aggravated conducted constituting more than ordinary negligence. 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id*. at 2003–04; *Rochester & Pittsburgh Coal*, 13 FMSHRC at 194; *see also Buck Creek Coal*, 52 F.3d at 136 (approving the Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest*

[6] The Commission in *Cumberland Coal Resources* remanded to the Administrative Law Judge for a reassessment of civil penalties, as it vacated the Judge's conclusions on the issue of S&S. 2011 WL 5517385, at *11. Cumberland Coal Resources appealed the Judge's Decision on Remand to the Commission, which denied its Petition for Discretionary Appeal. *Cumberland Coal Res., LP*, Docket No. PENN 2008-189 (FMSHRC Nov. 14, 2011). The Administrative Law Judge's decision is currently on appeal before the United States Court of Appeals for the D.C. Circuit. *Cumberland Coal Res., LP*, Docket No. PENN 2008-189 (FMSHRC Oct. 25, 2011) (ALJ), *appeal docketed*, No. 11-1464 (D.C. Cir. Nov. 29, 2011).

Material Co., 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal*, 14 FMSHRC at 1261; *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243–44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC at 353.

V. Further Findings of Fact, Analysis, and Conclusions of Law

A. Order No. 7269576 – Ventilation Controls

1. Violation – § 75.370(a)(1)

Order No. 7269756 alleges a violation of the Secretary's mandatory safety standard at 30 C.F.R. § 75.370(a)(1), which provides:

> The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine.

Every ventilation control between the 023 MMU return entry's turn out of the 023 MMU and its intersection with the main return entry had significant holes. These ventilation controls were designed to prevent any combustible coal dust or methane gas in the return air from mixing with intake air ventilating the main intake, conveyor belt, and roadway. Here, Frampton discovered that the leaky ventilation controls allowed return air to enter the streams of fresh intake air. The ventilation controls thus failed their purpose of controlling the flow of methane or coal dust through the mine.

Most importantly, Pine Ridge Superintendent Matkins admitted that the holes in Pine Ridge's overcasts and stoppings were improper and needed repair:

> Q: You're not testifying that it was okay to have those holes there, are you?
> A: No, if the holes had been discovered through the weekly examination or just through construction of the overcast, they would have been repaired.
> Q: But those holes are not in compliance with your ventilation plan?
> A: You're not supposed to have holes in your stoppings. That's a bad practice... .
> . . . .
> . . . [Y]ou would just have a hole in the stopping that needs repaired.

(Tr. 115–16.) (*See* Ex. J-5, at 134–35 (stating that holes in overcast would have been repaired had they been discovered).)

However, Pine Ridge's position is that the holes themselves did not violate its ventilation plan. (Resp't Br. 4–6; Resp't Reply 2–5.) According to Pine Ridge, the only violation was the improper pressure differential between the 023 MMU return and the entries it intersected. (*Id.*) Pine Ridge points out that the pressure differential remained even after the holes in the overcasts and stoppings were repaired. (Resp't Br. 5–6; Resp't Reply 4–5.) Had the entries' air pressures been at the proper levels, fresh air would have leaked into the return entry, which would not have been as hazardous as contaminated air mixing with fresh air. (Tr. 20, 115–16.) Therefore, the pressure differential was the problem, not the holes in the ventilation controls. (Resp't Br. 6; Resp't Reply 4–5.)

It is true that the hole-ridden ventilation controls did not cause the leak of return air, insofar as the higher air pressure in the 023 MMU return entry pushed contaminated air into the lower-pressure primary intake entry, conveyor belt entry, and roadway entry. However, this view of the evidence is incomplete. It overlooks the crucial fact that the defective stoppings and overcasts gave passage to return air escaping from the 023 MMU into areas designated for intake air, including three entries. Had the holes not been present, return air would have escaped into the other entries primarily through opening the overcasts' man doors, which typically remain closed. As Pine Ridge Superintendent Matkins acknowledged, underground mining conditions are dynamic, and events occurring during the course of "normal mining activity," such as a collapsing block of coal or a change in the outdoor barometric pressure, can precipitate sudden changes in the mine ventilation system's pressure, which may not be immediately detected. (Tr. 99.) As the discoveries of MSHA Inspector Frampton show, effective ventilation controls are vital to maintaining the proper flow of air through the mine. Pine Ridge's defective ventilation controls significantly contributed to improper airflow through the mine. Matkins admitted that fixing the holes was a necessary repair, just as a reasonably prudent mine operator would have recognized the holes in the overcasts and stoppings as hazards and repaired them. Accordingly, I determine that Pine Ridge violated 30 C.F.R. § 75.370(a)(1).

2. Gravity and S&S

I have concluded that Pine Ridge violated 30 C.F.R. § 75.370(a)(1), one of the Secretary's mandatory safety standards, thus satisfying the first element of the *Mathies* test.

According to MSHA Inspector Frampton, the defective ventilation controls created two discrete safety hazards. First, by allowing contaminated return air to seep into the 022 MMU intake entry and the roadway entry, the violation increased miners' exposure to coal and rock dust, contributing to the risk of occupational respiratory diseases such as black lung. (Tr. 32.) Second, Frampton determined that should a fire have occurred in the 023 MMU area of the mine, smoke could have permeated the primary entry to the 022 MMU and the roadway, which serve as the primary and secondary escapeways for the 022 MMU area, respectively. (*Id.*) That would have forced miners working on the 022 MMU to travel through smoke-filled passageways on their more than two-mile trip to the surface of the mine. (*Id.*) These discrete safety hazards satisfy the second element of *Mathies*.

The next issue is whether the hazard fostered by Pine Ridge's violation was reasonably likely to result in an injury. The Secretary's position on this question is that "in evaluating whether the violations of [s]ection 75.370(a)(1) are S&S, one should assume the occurrence of the event that properly implemented ventilation plans are designed to prevent or lessen in severity." (Sec'y Br. 15.) Pine Ridge submits that analysis of the S&S issue should consider "the conditions and particular sequence of events as the inspector found them when the violation was written" and that the facts here do not support a conclusion of S&S. (Resp't Br. 7–11; Resp't Reply 5–10.)

Here, Pine Ridge Superintendent Matkins admitted that the violation exposed miners to coal and rock dust, though, alluding to the slow, progressive nature of black lung disease, he thought that what he perceived as the brief duration exposure was not problematic: "The only hazard that I believe could have existed is this respirable dust, and again, that's not something that's going to develop over two days." (Tr. 103–04.)

Notwithstanding the Mine Act's thirty-five-year-old mandate to ensure "to the greatest extent possible, that the working conditions in each underground coal mine are sufficiently free of respirable dust concentrations in the mine atmosphere to permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis [black lung disease] or any other occupation-related disease," 30 U.S.C. § 841(b), coal dust-induced respiratory ailments remain a pernicious risk to coal miners' health. Recent data from the National Institute for Occupational Safety and Health indicate that black lung is becoming more common among the nation's coal miners, with even younger miners showing evidence of advanced and seriously debilitating lung disease. Lowering Miners' Exposure to Respirable Coal Mine Dust, Including Continuous Personal Dust Monitors, 75 Fed. Reg. 64,412, 64,413 (Oct. 19, 2010).

The Commission has long recognized the insidious nature of black lung disease:

> There is no dispute, however, that overexposure to respirable dust *can* result in chronic bronchitis and pneumoconiosis. The effects of the health hazards associated with overexposure to respirable dust usually do not cause immediate symptoms—as noted, simple pneumoconiosis is asymptomatic. This factor makes precise prediction of whether or when respiratory disease will develop impossible. Likewise, it is not possible to assess the precise contribution that a particular overexposure will make to the development of respiratory disease. In sum, the present state of scientific and medical knowledge . . . do[es] not make it possible to determine the precise point at which the development of chronic bronchitis or pneumoconiosis will occur or is reasonably likely to occur.

Consolidation Coal Co., 8 FMSHRC 890, 898 (June 1986), *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987). Indeed, the nebulous, progressive nature of black lung disease is why a violation of the Secretary's underground respirable dust concentration standard raises the rebuttable presumption that the violation is S&S. 8 FMSHRC at 899.

Similarly, Pine Ridge has acknowledged that its violation exposed its miners to the hazards of respirable dust. Although Frampton did not take samples of the air during his inspection (Tr. 53), it is more likely than not that the violation would have subjected miners to heightened levels of coal and rock dust during the course of continued normal mining operations, as return air was allowed to flow into the 022 MMU's primary intake entry and the roadway entry used by the miners in both working sections. Moreover, during the course of continued normal mining operations, this dust exposure would be reasonably likely to contribute to the development of black lung disease, a condition with debilitating health consequences. The hazard associated with this violation satisfies the third and fourth elements of *Mathies*.

As for the second safety hazard present at the mine, the salient question is whether the seepage of smoke through the numerous holes in the overcasts spanning the primary and secondary escapeways during a mine fire was reasonably likely to result in injuries in the event of a mine fire. The specific likelihood of a fire or explosion at the mine is not at issue, as that was not the hazard associated with the violation. Smoke leaking through the numerous holes in these overcasts would have affected miners as they attempted their two-mile journey to the surface, with the attendant risks of serious injuries from smoke inhalation or falls. Thus, I determine that this hazard satisfies the third and fourth elements of *Mathies*, too.

Based on the foregoing, the discrete safety hazards associated with Pine Ridge's violation were highly likely to result in reasonably serious injuries. Accordingly, the gravity allegations set forth in Order No. 7269756 are affirmed, and I conclude that the violation was S&S.

3. Negligence and Unwarrantable Failure

Undoubtedly, Pine Ridge's failure to properly construct the overcasts and stoppings constituted negligent conduct. Here, the hole-ridden overcasts and stoppings amounted to a violation posing a reasonable risk of serious injury. These ventilation controls were supposed to prevent contaminated air flowing through the 023 MMU return entry from infiltrating the entries lying between the return entry's turn out of the 023 MMU and the intersection with the main return entry. In fact, this area had only two other ventilation controls in addition to seven cited by MSHA Inspection Frampton. Frampton found that not one of these seven poorly-built controls (four stoppings and three overcasts) was effective. Pine Ridge Superintendent Matkins even acknowledged that the holes in the one overcast that he saw stemmed from an inherent flaw in its construction—namely, that the mostly-hollow metal decking of the Kennedy panels extended approximately eighteen inches on either side of the overcast. Significantly, I grant significant weight to Frampton's testimony that these were some of the worst ventilation controls he has seen in his thirty-seven-year career in underground coal mining. (Tr. 43–44; Ex. J-4, at 113.)

Moreover, the holes were visible. The holes in two of the stoppings were so large that they could be seen from dozens of feet away, as they were illuminated by lights hung along a conveyor belt running through an entry four crosscuts back from the stoppings. Though Pine Ridge speculates that these lights could have been switched off, nothing in the record before me

supports that proposition. (Resp't Br. 15; Resp't Reply 15.) The holes in the overcasts were also readily visible, as they were formed by the defective Kennedy panel's eighteen-inch span over each side of the overcast's lower walls, which were approximately just below eye-level at five feet. Matkins insisted that the holes were not readily visible because, to be seen, one had to hunch down to see the hollow portions of the Kennedy panel's metal decking, which was about five feet off the mine floor. (Tr. 77.) Indeed, the breaches of the overcasts' protective barrier were located in the overhang between the hollow Kennedy panel decking and the overcasts' lower walls. Nevertheless, the defects in the overcasts were so extensive and obvious that a superficial inspection of any of the overhangs of the overcasts' Kennedy panels by slightly hunching down near one would have revealed the problem.

The violative condition was also permitted to persist for an extended period of time—twelve days. Matkins admitted that these holes most likely had existed since the overcasts' construction immediately prior to the start of production on the 023 MMU on Friday, May 4, 2007. (Tr. 75.) Moreover, Matkins admitted that these holes constituted necessary repairs. At the same time, Matkins inspected the return two days prior to Frampton's May 16 inspection, but he made no mention of the conditions of ventilation controls themselves. Matkins conducted this inspection after he had just returned from a week of leave for the birth of his daughter. Together I find this evidence insufficient to overcome the conclusion that the holes pervading the ventilation controls of the 023 MMU return were inexcusably overlooked.

Based on these considerations, the other evidence held out by Pine Ridge to mitigate its negligence does not lessen its culpability for this violation. Matkins's observation that even well-made ventilation controls leak is minimally relevant here because its ventilation controls were not well-made and needed significant repairs. (Tr. 73–74; Resp't Reply 15.) Additionally, Pine Ridge's post-violation efforts to correct the condition did not reduce its culpability for the violation itself. (Resp't Br. 13; Resp't Reply 12.) Rather, Pine Ridge was required to do so to avoid further sanctions under the Mine Act. *See* 30 U.S.C. § 820(b)(1) (providing civil penalty for failure to abate a violation). Finally, Pine Ridge notes that the evidence does not demonstrate how long the improper airflow persisted through the 023 MMU return. (Resp't Br. 14–15; Resp't Reply 14.) However, this misstates the issue. The problem in this case is that Pine Ridge used inadequate ventilation controls, which failed to control the flow of return air due to changing conditions associated with normal mining operations. The fact that a poorly built dam does not leak during the dry season is not evidence that it will prevent a flood during a strong summer storm.

Given the gravity of this violation, its extensive and obvious nature, and the fact that it was allowed to persist for twelve days, I conclude that Pine Ridge's violation arose from aggravated conduct constituting more than ordinary negligence, and thus was an unwarrantable failure to comply with the Secretary's mandatory safety standard.

4. Penalty

Under Section 110(I) of the Mine Act, the Administrative Law Judge must consider the following six criteria in determining an appropriate civil penalty:

> [T]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(I).

As the Commission noted in *Rushford Trucking*, "the principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established." 22 FMSHRC 598, 600 (May 2000).

Here, Pine Ridge demonstrated good faith in attempting to achieve rapid compliance once MSHA Inspector Frampton issued the order. Pine Ridge is also a relatively large operator, and the assessed penalty would not inhibit its ability to remain in business. Pine Ridge's history of violations shows eleven prior S&S violations of the Secretary's ventilation plan standard at 30 C.F.R. § 75.370(a)(1), which were significantly less grave than the one presented in this case. (Ex. G-2.) However, Pine Ridge's failure to address the holes in nearly every ventilation control of the 023 MMU return entry between the entry's exit from the section and the main return entry for at least twelve days prior to Frampton's inspection was an unwarrantable failure to comply with the Secretary's mandatory safety standard. The gravity of Pine Ridge's violation was serious, as it was S&S and posed the risk of permanently disabling injuries. Based on these considerations, I assess a $45,000 penalty for this violation.

B. Order No. 7269757 – Weekly Examinations

1. Violation

As for Order No. 7269757, the Secretary alleges that Pine Ridge violated 30 C.F.R. § 75.364 which states:

> (b) *Hazardous Conditions.* At least every 7 days, an examination for hazardous conditions at the following locations shall be made by a certified person designated by the operator:
> . . . .
> (2) In at least one entry of each return air course, in its entirety, so that the entire air course is traveled.

As discussed above, Pine Ridge's hole-ridden stoppings and overcasts did not comply with its ventilation plan and posed a significant safety hazard that created the risk of permanently disabling injuries to twenty miners. *See* discussion *supra* Part V.A.1 and Part V.A.2. The holes constituted necessary repairs, as they were important to controlling the flow of contaminated return air leaving the 023 MMU section. *Id.* As for this violation, Pine Ridge disputes that the holes were inherently hazardous. It asserts that its weekly examiner could have seen the holes but determined they were not "hazards," as the air pressure at the time of the examination could have forced fresh air from the intake entry, conveyor belt entry, and roadway entry into the return entry, instead of the other way around, as MSHA Inspector Frampton's investigation revealed. (Resp't Br. 16–17; Resp't Reply 15–17.) Pine Ridge's reasonable doubts about the air pressure of this area of the mine during the weekly examination preceding the Order is too thin of a reed upon which to rest a conclusion that these defective ventilation controls were not hazardous. The determination of compliance with this safety standard is an objective inquiry that asks whether the reasonably prudent operator conducted an adequate examination for "hazardous conditions."

As stated above, these holes were inherently hazardous because they failed to control the flow of return air through the mine during continued normal mining operations. *See* discussion *supra* Part V.A.1 and Part V.A.2. A reasonably prudent mine operator would have recognized and noted the significant risks they posed. *Id.* MSHA Inspector Frampton's review of Pine Ridge's inspection records revealed no notation of these hazards. An adequate weekly inspection would have noted these obvious problems. *See* discussion *supra* Part.A.3. Pine Ridge should have detected and recorded these hazards during its weekly examination of the return that took place between Friday, May 4, 2007, and Frampton's inspection twelve days later on Wednesday, May 16, 2007. It did not. Therefore, I determine that Pine Ridge violated 30 C.F.R. 75.364(b)(2).

2. Gravity and S&S

As noted above, the Secretary has established that Pine Ridge violated 30 C.F.R. § 75.364(b)(2), a mandatory safety standard, thus satisfying the first element of *Mathies*. Pine Ridge's failure to adequately examine the mine constituted a discrete safety hazard, meeting the second element of *Mathies*. The holes overlooked by its examination exposed the miners to the risk of black lung disease. *See* discussion *supra* Part V.A.2. Moreover, in the event of a fire in the 023 MMU, smoke would have flowed through these holes and into the primary and secondary escapeway and obstructed the miners in their attempt to safely escape the mine. *Id.* The hazards overlooked by Pine Ridge were reasonably likely to result in an injury of a reasonably serious nature. *Id.* This conclusion satisfies the remaining two elements of *Mathies*.

Therefore, I determine that Pine Ridge's failure to adequately examine the return entry rises to the level of an S&S violation. The gravity allegations set forth in Order No 7269757 are affirmed.

3. Unwarrantable Failure

As previously noted, Pine Ridge should have detected the holes in the overcasts when performing its weekly inspections, notwithstanding the fact that a modicum of effort was involved in stopping slightly to peer underneath the Kennedy panels jutting out of the overcasts and into the return entry. *See* discussion *supra* Section IV.A.3. These holes were spread across seven of the nine ventilation controls separating the 023 MMU return entry and the other perpendicular entries lying between the 023 MMU section and the main return entry. The pervasive nature of the holes in the overcasts, which stemmed from the fact that the overcasts' Kennedy panels visibly stuck out from the overcasts' walls, is highly significant. The obvious nature of this design flaw should have attracted the attention of Pine Ridge's weekly examiner. By that same token, the stoppings also had large, easily visible holes, which again were the result of their poor construction. These holes existed for at least twelve days. MSHA Inspector Frampton, who has thirty-seven years of underground mining experience up to the highest levels of private industry as a compliance officer, even noted that these ventilation controls were some of the worst he has ever seen. Coupled with Pine Ridge's belief that a condition may be "non-hazardous" in the absence of any contingencies of normal mining operations that could make that condition dangerous, it is apparent that the failure to address these holes rose to the level of inexcusable indifference toward the Secretary's safety standard. Again, Pine Ridge's position would absolve the builder of a shoddy dam of responsibility for a flood due to a seasonal summer storm just because the dam worked during the dry winter months. This surely does not reflect the prophylactic purpose of the Secretary's regulations. I conclude that Pine Ridge's conduct rose to the level of aggravated conduct constituting more than ordinary negligence, and thus was an unwarrantable failure to comply with the Secretary's mandatory safety standard

4. Penalty – Weekly Examinations

As noted above, I have considered Pine Ridge's history of violations, which does not show a significant history of breaching 30 C.F.R. § 75.364, as well as Pine Ridge's efforts to correct its violative conduct once it was identified by MSHA Inspector Frampton. Pine Ridge is also a relatively large operator, and the imposition of the Secretary's proposed penalty would not inhibit its ability to remain in business. As I have concluded above, however, the gravity of this violation was very serious and resulted from Pine Ridge's unwarrantable failure to comply with the Secretary's mandatory safety standard. Accordingly, I assess a penalty of $45,000 for this violation.

VI. Order

Based on the foregoing, Order Nos. 7269756 and 7269757 are hereby **AFFIRMED**. Pine Ridge is **ORDERED** to pay a penalty of $90,000 within 40 days of this decision.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

Distribution:

J. Matthew McCracken, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209

Melissa M. Robinson, Esq., Jackson Kelly, PLLC, 500 Lee Street East, Suite 1600, P.O. Box 533, Charleston, WV 25322

/jts, nev

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th Street, Suite 443
Denver, CO 80202-2500
303-844-3577/ FAX 303-844-5268

January 3, 2012

SECRETARY OF LABOR o/b/o	:	DISCRIMINATION PROCEEDING
CHARLES SCOTT HOWARD,	:	
Complainant,	:	Docket No. KENT 2011-1379-D
	:	
v.	:	
	:	
CUMBERLAND RIVER COAL COMPANY,	:	Mine: Band Mill No. 2
Respondent	:	Mine ID 15-18705

ORDER GRANTING, IN PART, THE SECRETARY'S MOTION TO COMPEL PRODUCTION

On November 3, 2011, the Secretary of Labor filed a Motion to Compel ("Motion"), joined by Complainant Charles Scott Howard, seeking the disclosure of documents listed on the privilege log prepared by Respondent, Cumberland River Coal Company ("CRCC"). The Respondent filed a motion in opposition, and subsequently an *in camera* review was conducted in order to determine if the privileges claimed by Cumberland were adequate to prevent the disclosure of the documents.

The documents submitted by Respondent for review include 77 pages made up primarily of single or two-page emails. The Respondent provided an updated privilege log with the documents and, at the same time, provided this revised list to the Secretary and Howard. The privilege log indicates that each of the 77 pages is withheld on the basis of the attorney-client privilege and the work product privilege.

Plaintiff Charles Scott Howard alleges that his employment was terminated as a result of his prior protected activities and that CRCC sought a medical opinion that would bar Howard's return to work. Sec'y Br. 1-2. Howard was working as an underground miner at CRCC in July 2010 when he suffered a head injury. In addition to the physicians who treated Howard, CRCC sought to have Howard examined by Dr. Granacher in March 2011. Sec'y Br. 2. Dr. Granacher concluded that Howard was able to do all the jobs he was trained to do with the only restriction being working "at heights" due to Howard's head injury. Sec'y Br. 2. Thereafter, Valerie Lee, the human resources director for CRCC, sent a questionnaire to Dr. Granacher seeking further information and a conclusion concerning Howard's ability to return to coal mine employment. Sec'y Br. 3. In May 2011, Howard's physician and a neurologist to whom he was referred released Howard to return to his prior employment without restrictions. Sec'y Br. 3. Howard returned to work on May 16, 2011. Sec'y Br. 3. The mine sought the further opinion of

Dr. Granacher who then signed the questionnaire stating that Howard was totally and permanently disabled for all work around moving machinery. Sec'y Br. 4. Howard was then terminated from employment at CRCC. Sec'y Br. 4.

With the exception of seven or eight pages, the documents withheld by CRCC are emails, each with a number of recipients. Howard asserts that those emails contain information about the company's plan to enlist the help of Dr. Granacher, who is known to support the position of employers, and to seek an assessment from Granacher that would prevent Howard from returning to work. All but a handful of the emails are from Penny Carter, an RN, employed by Bluegrass Health Network. CRCC indicates that Carter is their agent "re: Howard's workers compensation claim." Carter sent emails to Denise Hartling of the risk management and insurance department of Arch Coal, and to Valerie Lee, a CRCC human resources manager. The emails also listed a string of additional recipients, including Sue McReynolds, a claims administrator for Underwriters Safety & Claims ("Underwriters") which is listed by CRCC as their agent for Howard's workers compensation claim, other CRCC and Arch employees, and in some instances a copy was sent to Mike Kafoury, assistant general counsel for Arch. Based upon the limited information provided by CRCC, it appears that CRCC utilizes the services of Underwriters Safety & Claims to administer workers compensation benefits, and Underwriters in turn has a contract with Bluegrass Health Network for case management services. CRCC Br. 4. Therefore, McReynolds works for a company contracted by Arch, and Carter, in turn, is a contractor for McReynolds' employer. The communications from Carter, an RN with Bluegrass Health, therefore go to McReynolds, an employee of Underwriters, and to various people at Arch and CRCC. A number of those individuals who either sent or received the emails in question are potential witnesses in the case.

The Secretary alleges that the documents being withheld are central to the CRCC decision-making process regarding whether or not Howard would be allowed to return to work. I agree that they may shed some light on that process. The documents reviewed *in camera* contain many communications between CRCC employees, contractors, agents and others concerning the status of Howard's ability to return to work, and actions taken by the company in that regard. Moreover, many emails are back and forth, setting appointments, asking if a report is ready, and updating on the actions primarily of Penny Carter and her interaction with Granacher's office. CRCC states that Penny Carter is employed by Bluegrass Health and was responsible for scheduling doctors' appointments for Howard, receiving his diagnosis and prognosis, and monitoring the status of his recovery. CRCC Br. 4. The many recipients listed on various emails are employed either by CRCC, their parent Arch Coal, the workers compensation claims company and their subcontractors. Nearly all of the documents relate either directly (e.g., setting appointments) or indirectly (e.g., let's have a conference call) to the workers compensation claim of Mr. Howard and, specifically, to his ability to return to work. While CRCC alleges that the only communications withheld are those that are "created by or directed to" outside counsel for workers compensation, Denise Davidson, or Arch counsel, Michael Kafoury, that is not necessarily the case. CRCC Br. 6. CRCC also argues that these two attorneys were included, along with a list of other recipients, for the purpose of providing legal advice. CRCC is involved in a number of legal cases involving Howard, including other

discrimination cases before the Commission and before the U.S. District Court. In the cases not related to workers compensation, CRCC is represented by other outside counsel, and not by Davidson or Kafoury.

The Secretary argues first that the attorney-client privilege does not apply because the neither the person writing the email or receiving it is a "client" of CRCC, nor are the emails always directed to attorneys for CRCC. In addition, some of the emails, including those to Denise Hartling contain facts which she will be called upon to testify about and those cannot be shielded by a privilege. Further, the Secretary argues that there can be no work product privilege because the documents were not gathered in anticipation of litigation, nor are they a part of any information gathered by an attorney who represents a party in this discrimination litigation. She argues that, since Denise Davidson is a workers compensation counsel for Underwriters and Kafoury is an assistant counsel for Arch Coal, their work product applies only to the workers compensation litigation.

CRCC argues that a number of emails are directed to their outside workers compensation counsel, Denise Davidson, and Arch's Assistant General Counsel, Michael Kafoury. The remaining names on the emails are either employed by CRCC or are their agents, or the persons have a "common business purpose."[1] The documents were either generated for the purpose of obtaining legal advice or with an "eye toward existing or anticipated litigation." CRCC Br. 3. CRCC further argues that these emails were written to the in-house or outside attorney, and they supply information to the attorney for the purpose of receiving legal advice.

The Attorney-Client Privilege

The mine alleges that the attorney-client privilege applies to each of the 77 pages provided for *in camera* review. The documents can be divided into three general groups. First, the emails, described above, primarily from Penny Carter to a myriad of people with an occasional response. Next, the memos or pages from day planners from Jack McCarty, a CRCC employee and Valerie Lee, a CRCC human resources employee, are a separate group. Finally, there are four letters from Denise Davidson regarding the workers compensation claim of Howard.[2] I put these letters in a separate category, as they are the only pages that may have a legitimate claim of attorney-client privilege.

The Supreme Court has explained that the attorney-client privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Trammel v. United States,* 445 U.S. 40, 51 (1980). The Court reiterated this "need to know" focus in *Upjohn v. U.S.*, 449 U.S.

[1] The only common business purpose that I can see is that of following Howard through the workers compensation process, as they would do any employee, whether or not in litigation.
[2] It is not clear from the documents submitted by CRCC whether Davidson is employed and paid by Arch, by CRCC, or by Underwriters but all of her correspondence is addressed to Underwriters.

383, 390 (1981), where it stated that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."

The attorney-client; 5482;5482 privilege generally protects communications made by the client in confidence to his attorney. In order to claim the privilege, CRCC must demonstrate that the criteria for the attorney-client privilege have been met, namely:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is
>
> a member of the bar of a court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

See Hawkins v. Stables, 148 F.3d 379, 383 (4th Cir. 1998) (citing *U.S. v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982).

CRCC has met none of the requirements in addressing the emails as privileged. First, although a number of the emails contain the name of the in-house attorney for Arch, there is no indication that those emails came from someone who holds the status of "client." CRCC merely alleges that it is self-insured and, as a result, sees those working for Underwriters as employees or agents of CRCC. Penny Carter is even further removed from CRCC, as she is a contractor for Underwriters, not an employee or agent of CRCC. While I agree that employees, and in some cases, agents, can be clients of in-house counsel, the relationships here are too tenuous to indicate an attorney-client relationship. However, if Penny Carter or persons at Underwriters have an attorney-client relationship with CRCC attorneys, the emails are not sent to the in-house attorneys for the purpose of securing an opinion on law or legal services. Further the communication was made to any number of persons or strangers. The attorneys were merely another name on the string of recipients, and the fact that an attorney may have been on the string of recipients, does not make the email a privileged communication. I find, that there is not sufficient proof that the information-givers have significant ties to CRCC or share a common interest or business purpose, as asserted by CRCC. Even if they do, the emails are not for the purpose of seeking legal advice or opinion. Hence, CRCC has not met its burden of demonstrating that it meets the criteria for asserting the attorney-client privilege for the emails.

Moreover, factual information that may have been conveyed to Respondent's counsel by one or more authors of the emails, is generally not privileged or protected by the attorney-client privilege or the work product doctrine simply because the same facts have been conveyed to an

organization's attorney. *Upjohn Co. v. U.S.*, 449 U.S. 383, 395-396 (1981). Thus, "a party cannot conceal a fact merely by revealing it to his lawyer." *Id*. at 396; *United States v. Davis*, 131 F.R.D. 391, 401 (S.D.N.Y. 1990) ("[I]n house counsel's law degree and office are not to be used to create a privileged sanctuary for corporate records."); *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A*., 93 Civ. 6876, 1995 U.S. Dist. Lexis 14808, (S.D.N.Y. Oct. 10, 1995) ("Discoverability of a communication depends on its nature, rather than its source. A fact is discoverable regardless of how a deponent came to possess it."). Accordingly, documents prepared by the employees of contractors of CRCC or its parent company that contain factual information, are not protected. A review of the emails here demonstrates that each and every one contains factual information, such as appointment times and dates, the receipt of reports from various doctors concerning Howard's condition, and a general report regarding the actions taken by one of the contractors for CRCC or Underwriters. There is one email from CRCC's outside attorney simply forwarding an email from Howard's attorney (# 63-64) and some emails that include Kafoury, an Arch attorney, as one of many on a string of addresses, containing a brief response. (#49, 52 and 69-72). I find nothing that appears to be information provided to an attorney from a client in any of the emails, that were submitted for the purpose of obtaining legal advice and I find that they contain no advice from an attorney, but merely the conveyance of facts and an occasional inquiry into the status of Howard's appointments and forthcoming physicians reports. Therefore, I find, not only, that none of the items listed as an email on the privilege log provided by Respondent are subject to the attorney-client privilege but that the documents contain factual information that is not protected.

Outside of the 69 pages that are emails, there is a claim of attorney-client privilege for the day planner of Valerie Lee (#1-2), the day planner of Jack McCarty (#67), and a memo from Jack McCarty (#75). While they are not subject to an attorney-client privilege, the information redacted relates to other employees whose privacy may be violated by the disclosure of the full document. CRCC represents that these four documents have been provided in the redacted version, and I find that the redactions are appropriate. The material redacted appears to be information about other employees and not related to Howard in any way.

Finally, there are several letters from Davidson, the workers compensation attorney, to Underwriters concerning Howard (#19, 39, 53 and 59). These letters are directed to Sue McReynolds, the claims adjuster at Underwriters, and while they merely repeat what the doctors have told Underwriters, they do include some limited legal opinion as to the meaning of the reports. Although CRCC has not demonstrated that Davidson has an attorney-client relationship with them, I err on the side of caution in this instance. Therefore, I find these four documents to be subject to the attorney-client privilege and protected from disclosure.

Work Product Doctrine

The 69 pages of emails discussed above are also claimed as privileged under the theory of attorney work product. The attorney work product doctrine protects from disclosure materials assembled by or for an attorney in anticipation of litigation. FED. R. CIV. P. 26(b)(3) and (4). It includes documents prepared by someone other than an attorney, but for the same purpose. The

protected documents may be ordered disclosed only upon a showing that the party seeking discovery has substantial need for them and is unable to obtain their substantial equivalent by other means. "In ordering discovery . . . the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3).

Commission Procedural Rule 56(b), 29 C.F.R. § 2700.56(b), provides that parties may obtain discovery of any relevant matter that is not privileged. In *ASARCO*, *Inc.*, 12 FMSHRC 2548 (Dec. 1990), the Commission discussed the;1329;1330;1331;1329;1330;1331 work product privilege accepting the general standards of the federal court. In order to be protected by this immunity under FED. R. CIV. P. 26(b)(3), the material sought in discovery must be: (1) "documents and tangible things;" (2) "prepared in anticipation of litigation or for trial;" and (3) "by or for another party or by or for that party's representative." *See generally* 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2024, pp. 196-97 (1970); 6 J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶26.64 (2d ed. 1989). It is *not* required that the document be prepared by or for an attorney. Wright & Miller, *supra*, § 2024, pp. 207-09; Moore, *supra*, ¶26.64[2]; *U.S. v. Chatham City Corp.*, 72 F.R.D. 640, 642-43 (S.D. Ga. 1976).

If materials meet the tests set forth above, they are subject to discovery "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." FED. R. CIV. P. 26(b)(3). If the court orders that the materials be produced because the required showing has been made, the court is then required to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.*; *Asarco* 12 FMSHRC 2548 (Dec. 1990). The burden of satisfying the three-part test is on the party seeking to invoke the ;1522;1523;1524;1522;1523;1524privilege, but once that party has met its burden, the burden shifts to the party seeking disclosure to make a requisite showing that there is substantial need and undue hardship to overcome the;1557;1557 privilege. *P. & B. Marina, Ltd. Partnership v. Logrande*, 136 F.R.D. 50, 57 (E.D.N.Y. 1991), *aff'd*, 983 F.2d 1047 (2d Cir. 1992).

As in *ASARCO,* the key question here is whether the materials sought were prepared in anticipation of litigation. The materials in dispute were prepared by some contractors, and in some instances by employees of Arch or CRCC. In light of the nature of the emails, the documents cannot be fairly said to have been prepared with of the prospect of litigation. Instead, I find that the documents were prepared in the ordinary course of business and not for the purpose of litigation. The 69 documents are primarily a summary by a contractor of the actions she has taken with regard to Howard's work injury. They include information about doctors, appointments, transmittals of doctors reports and schedule changes, and are simply not directed at litigation but would be generated in the normal course of business.

The phrase "prepared in anticipation of litigation" was defined in *Hickman v. Taylor*, 329 U.S. 495 (1947), which answered "the basic question" of whether one party's counsel may

"inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation." *Id*. at 505. Attorney work product was defined as the "files and the mental impressions of an attorney . . . reflected . . . in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." *Id*. at 510-11. The court notes, with regard to factual information that may have been conveyed to Respondent's counsel by one or more of these employees or contractors, that purely factual information is generally not privileged or protected by the work product doctrine simply because the same facts have been conveyed to an organization's attorney. *Upjohn Co. v. U.S.*, 449 U.S. 383, 395-396 (1981).

Here the emails contain almost entirely factual information. I have found no deliberation, opinion, comments, or revelations of mental impressions of an attorney or a person other than an attorney. The facts of this particular case, and a review of the 69 pages of documents, lead me to conclude that the documents were not generated in the course of an investigation, were not prepared for possible litigation, and were not prepared by an attorney or someone acting in her place. The documents were not prepared "in anticipation of litigation."

Finally, even if it could be said that the documents were subject to the work product privilege, the Secretary has shown a substantial need for the factual information in the documents. A review of the documents has established that they contain information so related to critical events that Howard could have a substantial need for the documents in preparation of his case. At the heart of this case is the allegation that CRCC deliberately chose Dr. Granacher to render an opinion and sought to influence that opinion. The emails contain facts that relate to those allegations, and Howard would have no other means to establish those facts. Hence, the need for disclosure is substantial. I see nothing in the emails that would lead me to believe that they need to be redacted to remove any impression or opinion of a CRCC or Arch attorney.

The documents, the 69 emails, are therefore shielded neither by the attorney-client nor the attorney work product privileges asserted by Cumberland River Coal Company ("CRCC"). The Secretary's Motion to Compel Production is **GRANTED,** in part, and CRCC is hereby **ORDERED** to provide a copy of each document attached to its privilege log with the exception of the documents numbered 1, 2, 67, 75, 19, 39, 53, and 59.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

Distribution:

Mary Sue Taylor, Office of the Solicitor, U.S. Dept. of Labor, 618 Church St., Suite 230, Nashville, TN 37219.

Tony Oppegard, P.O. Box 22446, Lexington, KY40522

Wes Addington, Appalachian Citizens Law Center, 317 Main St., Whiteburg, KY 48158

Willa Perlmutter and Glenn Grant, Crowell & Moring LLP, 1001 Pennsylvania Ave N.W., Washington D.C. 20004-2595

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

January 10, 2012

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2011-862 A.C. No. 46-08646-241826
v.	
ROCK N ROLL COAL COMPANY, Respondent	Mine: Mine No. 3

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION OF ORDER REJECTING SETTLEMENT

Before: Judge McCarthy

The Secretary's Motion and Commission Rule 31

On November 9, 2011, the Secretary of Labor, acting through counsel in the Solicitor's office, submitted a Motion to Approve Settlement and a Consent Order Approving Settlement pursuant to Commission Rule 31, 29 C.F.R. § 2700.31, which provides:

> § 2700.31 Penalty settlement.
>
> (a) General. A proposed penalty that has been contested before the Commission may be settled only with the approval of the Commission upon motion. In all penalty proceedings, except for discrimination proceedings arising under section 105(c) of the Mine Act, 30 U.S.C. 815(c), a settlement motion must be accompanied by a proposed order approving settlement. In discrimination proceedings, a party shall file a motion to approve settlement that includes the factual support described in paragraph (b)(1) of this section, and that shall be filed and served in accordance with the provisions of 29 CFR 2700.5 and 2700.7, respectively. In discrimination proceedings, a party need not file a proposed order.
>
> (b) Content of motion.
>
> (1) Factual support. A motion to approve a penalty settlement shall include for each violation the amount of the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties.

Rather than setting forth such information in detail, the motion may incorporate by reference the information which has been included in the accompanying proposed order as required by paragraph (c)(1) of this section.

(2) Certification. The party filing a motion must certify that the opposing party has authorized the filing party to represent that the opposing party consents to the granting of the motion and the entry of the proposed order approving settlement.

(c) Content of proposed order.

(1) Factual support. A proposed order approving a penalty settlement shall include for each violation the amount of the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties. Forms for proposed orders approving settlement are available on the Commission's website (http://www.fmshrc.gov). Although parties are not required to use the forms on the Commission's website, if proposed orders fail to include pertinent information, the motion and proposed order may be rejected for filing by the Commission in accordance with paragraph (f) of this section. Proposed orders shall not be submitted in PDF format.

(2) Appearance by CLR. If a motion has been filed by a Conference and Litigation Representative ("CLR") on behalf of the Secretary, the proposed order approving settlement accompanying the motion shall include a provision in which the Judge accepts the CLR to represent the Secretary in accordance with the notice of either limited or unlimited appearance previously filed with the Commission. A CLR does not need to obtain authorization from the Commission to represent the Secretary before the CLR files a motion to approve settlement and proposed order.

(d) Filing and service of motion accompanied by proposed order.

(1) Electronic filing. A motion and proposed order shall be filed electronically according to the requirements set forth in this rule and instructions on the Commission's website (http://www.fmshrc.gov). Filing is effective upon the date of the electronic transmission of the motion and proposed order. The transmitting party is responsible for retaining records showing the date of transmission, including receipts.

(i) Signatures. Any signature line set forth within a motion to approve settlement submitted electronically shall include the notation "/s/" followed by the typewritten name of the party or representative of the party filing the document. Such representation of the signature shall be deemed to be the original signature of the representative for all purposes unless the party representative shows that such representation of the signature was unauthorized. See 29 CFR 2700.6.

(ii) Status of documents. A motion and proposed order filed electronically constitute written documents for the purpose of

applying the Commission's procedural rules (29 CFR part 2700), and such rules apply unless an exception to those rules is specifically set forth in this rule. Any copies of the motion and proposed order which have been printed and placed in the official case file by the Commission shall have the same force and effect as original documents.

(2) Filing by non-electronic means. A party may file a motion to approve settlement and an accompanying proposed order by non-electronic means only with the permission of the Judge.

(3) Service. A settlement motion and proposed order shall be served on all parties or, if parties are represented, upon their representatives, by the most expeditious means possible and at least five business days before the motion and proposed order are filed with the Commission. If a party cannot be served by email, facsimile transmission, or commercial delivery, a copy of the motion and proposed order may be served by mail. A certificate of service shall accompany the motion and proposed order setting forth the date and manner of service.

(e) Filing of motion and proposed order prior to filing of petition. If a motion to approve settlement and proposed order is filed with the Commission before the Secretary has filed a petition for assessment of penalty, the filing party must also submit as attachments, electronic copies of the proposed penalty assessment and citations and orders at issue. If such attachments are filed, the Secretary need not file a petition for assessment of penalty.

(f) Non-acceptance of motion and proposed order. If a party filing a motion to approve settlement and a proposed order fails to include in the motion and proposed order pertinent information required by this rule and the Commission's instructions posted on the Commission's website, the Commission will not accept for filing the motion and proposed order. Rather, the Commission will inform the filing party of the need for correction and resubmission.

(g) Final order. Any order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record. Such order shall become the final order of the Commission 40 days after issuance unless the Commission has directed that the order be reviewed. A Judge may correct clerical errors in an order approving settlement in accordance with the provisions of 29 CFR 2700.69(c).

In her Motion to Reconsider, the Secretary requests that Citation No. 8093045 be modified to change the classification of the citation from a 104(d)(1) citation to a 104(a) citation and to reduce the level of negligence from "high" to "moderate." The modification was accompanied by a reduction in the penalty from $13,609 to $3,690. No factual basis was provided to justify the proposed modification to the citation or the resulting change in penalty. In particular, no factual explanation of mitigating circumstances was offered by the Secretary.

On December 8, 2011, the Secretary was informed by my office that I was unable to properly assess the adequacy of the proposed settlement without some factual basis for the proposed modification. Having failed to respond to my first request after eleven days, the Secretary was informed by my office that she would have until December 23, 2011 to submit a revised settlement. On December 20, 2011, following subsequent communication with the parties and after it became clear that the Secretary was not willing to comply with my request to provide additional factual support, I issued an Order rejecting the Secretary's proposed settlement. In consideration of the impending holidays, the Order granted the Secretary an additional fifteen days to make the appropriate modification to the proposed settlement.

On January 4, 2012, rather than submitting a revised settlement, the Secretary filed a Motion to Reconsider and Approve Settlement. In her Motion to Reconsider, the Secretary essentially contends that the Mine Act does not impose any duty to provide factual justification for settlement when the Secretary's proposed reduction in penalty is consistent with the assessment criteria set forth in 30 C.F.R. § 100. Mot. at 2. The Secretary argues that the power to make substantive modifications to citations and orders is within the Secretary's unreviewable prosecutorial discretion and that the Commission's review of settlement proposals should be limited to whether the agreed upon penalty amount is consistent with the agreed upon substantive modification. Mot. at 3. The Secretary relies on the plain language in the last sentence of section 110(i) of the Act, which provides that "[i]n proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors." Thus, the Secretary argues, the plain language of the Act does not require that she submit detailed factual findings in support of the penalty criteria. Id. Furthermore, the Secretary contends that providing detailed evidentiary or factual justifications for substantive modifications to citations and orders will necessarily require the Secretary to reveal her evidentiary evaluations, her legal theories, and her work product in a settlement motion, and inject the Commission into prosecutorial matters that would discourage voluntary settlements. Mot. at 4, 5. The Secretary also argues that it is absurd to conclude that the Secretary has unreviewable discretion to completely vacate a citation, but lacks the same level of discretion to make modifications short of vacation. Mot. at 4. Finally, the Secretary represents that the Respondent's representative has reviewed and agrees with her Motion. Mot. at 5.

Analysis and Disposition

The Commission derives its authority to review the adequacy of settlements proposed by the Secretary from section 110(k) of the Act which states that; "No proposed penalty, which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). Thus, the Secretary arguably maintains unreviewable prosecutorial discretion to modify the citation during pre-assessment conference proceedings before the matter is contested before the Commission, but absent such early intervention, the Commission retains authority to approve settlements of civil

penalties in matters contested before the Commission.[1] Congress, through Section 110(k), obviously thought it was important for miners' safety and health that the Commission review the Secretary's attempts to compromise, mitigate or settle proposed penalties in contested cases. Congress made clear, when it enacted the 1977 Mine Act, that the terms of all settlements had to be on the record and that the Commission has the final say on the settlement of contested cases. The following excerpt from the legislative history makes this clear:

> In addition to the delay in assessing and collecting penalties, another factor which reduces the effectiveness of the civil penalty as an enforcement tool under the Coal Act is the compromising of the amounts of penalties actually paid. In its investigation of the penalty collection system under the Coal Act, the Committee learned that to a great extent the compromising of assessed penalties does not come under public scrutiny. Negotiations between operators and Conference Officers of MESA are not on the record. Even after a Petition for Civil Penalty Assessment has been filed by the Solicitor with the Office of Hearings and Appeals, settlement efforts between the operator and the Solicitor are not on the record, and a settlement need not be approved by the Administrative Law Judge. Similarly, there is considerable opportunity for off the record settlement negotiations with representatives of the Department of Justice while cases are pending in the district courts.
>
> While the reduction of litigation and collection expenses may be a reason for the compromise of assessed penalties, the Committee strongly feels that since the penalty system is not for the purpose of raising revenues for the Government, and is indeed for the purpose of encouraging operator compliance with the Act's requirements, the need to save litigation and collection expenses should play no role in determining settlement amounts. The Committee strongly feels that the purpose of civil penalties, convincing operators to comply with the Act's requirements, is best served when the process by which these

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[1] In January 2012, MSHA will resurrect an abandoned but effective practice of implementing pre-assessment conferencing procedures to help reduce any backlog of future violations before the Commission. As noted in MSHA's press release, under the procedures in most MSHA districts, a mine operator and miners' representative may request a conference regarding a contested citation or order only after MSHA proposes a penalty assessment, and any settlements require approval by the Commission. The new conferencing process is designed to provide early resolution of disputes and reduce the number of contested citations and orders by resolving disputes before litigation ever occurs. *See* Press Release, Dep't of Labor, MSHA to Start Using Pre-Assessment Conferencing Procedures (Dec. 1, 2011), *available at* http://www.msha.gov/MEDIA/PRESS/2011/NR111201.pdf.

> penalties are assessed and collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.
>
> To remedy this situation, Section 111(1) provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission. Similarly, under Section 111(1) a penalty assessment which has become the final order of the Commission may not be compromised except with the approval of the Court. By imposing these requirements, the Committee intends to assure that the abuses involved in the unwarranted lowering of penalties as a result of off the record negotiations are avoided. It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties.

S. SUBCOMM. ON LABOR, COMM. ON HUMAN RESOURCES, FEDERAL MINE SAFETY AND HEALTH ACT OF 1977, S. Rep. 95-181, at 44 (1977), reprinted in 1977 U.S.C.C.A.N. 3401, 3445.

Accordingly, the Commission has held that section 110(k) "directs the Commission and its judges to protect the public interest by ensuring that all settlements of contested penalties are consistent with the Mine Act's objectives." Knox County Stone Co., 3 FMSHRC 2478, 2479 (Nov. 1981). Thus, while it is within the Secretary's prosecutorial discretion to vacate a citation, see, e.g., RBK Constr. Inc., 15 FMSHRC 2099 (Oct. 1993), once the citation is contested before the Commission, the final approval of any mitigation, compromise, or settlement is a quintessentially adjudicatory function. To perform that function in exercise of its statutory authority, the Commission has promulgated Rule 31 concerning penalty settlements, which provides, inter alia, that a motion to approve a penalty settlement shall include facts in support of the penalty agreed to by the parties. See, supra, Commission Rule 31(b)(1). Thus, "[s]ettlements are committed to the 'sound discretion' of the Commission and its judges" and they "are not bound to endorse all proposed settlements." Madison Branch Management, 17 FMSHRC 859, 864 (June 1995).

It is clear from the plain language of section 110(k), the legislative history quoted above, and Commission precedent and procedural rules that I am required to assess a proffered settlement that reduces a proposed penalty in a matter contested before the Commission against the penalty criteria of section 110(i) and the comprehensive objectives of the Act. Without having been provided with any factual basis to justify the modification at issue, I am unable to fulfill my obligations under the Act, and decline to approve the Secretary's proposed settlement.

The Secretary's arguments to the contrary lack merit. The language of Section 110(i) relied on by the Secretary does little to advance her arguments in the settlement context. The final sentence in section 110(i) is a directive to the Secretary when issuing a proposed civil penalty, not when seeking Commission approval of a proposed settlement. It is reasonable to expect that a higher factual burden be placed on a settlement than when a civil penalty is initially

proposed. In any event, the fact that the Secretary need not make findings of fact when proposing a settlement does not mean that the Commission cannot require them when approving a settlement in a contested case that reduces, compromises or otherwise mitigates the penalty. As shown above, the Secretary's efforts at self-aggrandizement directly collide with Congressional intent that the Commission ensure that the public interest is adequately protected before approval of any reduction in penalties.

I also find no merit in the Secretary's argument that requiring a factual explanation for a proposed modification to a citation or order in a contested matter in the settlement context would require detailed findings of fact or be unduly burdensome. In the majority of cases, the Secretary need only proffer a short factual justification for the modification to the citation and concomitant reduction in penalty, which presumably has been provided by the operator and need not be agreed to by the Secretary. In cases where the alleged violative condition or practice is more severe or has resulted in actual injury or death of a miner, however, a more detailed justification may be required by the Commission to ensure compliance with the Act's objectives. In either case, it has never been suggested that the Secretary must provide affidavits or weighty proffers to justify the proposed settlement.

I similarly reject the Secretary's argument that requiring a factual basis would compromise the Secretary's thought processes, legal theories, or work product privilege. The factual basis for a settlement does not need to include the thought processes, legal theories, or work product of the Secretary to provide sufficient guidance as to whether the settlement effectuates the purposes of the Act. It needs to include a proffer of facts sufficient to justify the settlement. Such facts generally are not encompassed by the work product privilege, which applies to documents prepared in anticipation of litigation, not settlement. See, e.g. ASARCO, Inc., 12 FMSHRC 2548, 2557-58 (December 1990). The privilege is intended to prevent an unfair advantage to the opposing party. There is no such advantage to be gained in settling a case in the public interest. And if, for example, the Secretary agrees in a settlement that there is some validity to the respondent's arguments, such an admission is not admissible if the settlement is rejected and the case heard.

The Secretary contends by way of hypothetical that she should not be required to reveal her decision-making process in seeking approval of a settlement or admit that she lacks sufficient evidence to confidently pursue her case, such as when she does not want to compel a reluctant witness to testify. No such requirements are imposed on the Secretary. In such situations, the Secretary truthfully, but artfully, can set forth the factual basis for settlement without revealing deliberative process or mental impressions, or, if she cannot somehow do so and can no longer meet her burden of proof, she can exercise her discretion to vacate the underlying citation or order. What she cannot do, as the Secretary's counsel audaciously has done here, is to fail to include in the settlement motion facts in support of the penalty agreed to by the parties, as set forth in Commission Rule 31(b)(1).

The Secretary's Motion for Reconsideration of Order Rejecting Settlement fails to provide valid argument to justify her refusal to provide a factual basis for the settlement of the above-captioned matter. Accordingly, the Motion for Reconsideration is DENIED. A Notice of Hearing will issue under separate cover.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

Distribution:

Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209-2247

James F. Bowman, Rock N Roll Coal Company, Inc., P.O. Box 99, Midway, WV 25878

/tjr

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

January 18. 2012

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2010-968-M A.C. No. 33-01993-229163
v.	
MORTON SALT DIVISION / MORTON INTERNATIONAL INC., Respondent	Mine: Fairport

ORDER ACCEPTING APPEARANCE
ORDER DENYING SETTLEMENT MOTION

Before: Judge Lesnick

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary of Labor's Conference and Litigation Representative ("CLR") filed a notice of limited appearance in this case. It is **ORDERED** that the CLR be accepted to represent the Secretary. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994). The CLR has filed a motion to approve settlement. A reduction in the penalty from $5,000.00 to $100.00 is proposed. The CLR also requests that Citation No. 6501298 be modified to specify that 30 C.F.R. § 56.10(d) was violated, rather than 30 C.F.R. § 50.10(a) as set forth in the citation, and to reduce the level of negligence from "high" to "moderate."

Citation No. 6501298 specifies that Morton Salt's Fairport Mine "experienced a power outage affecting both hoists on 6/22/2010. The mine operator failed to notify MSHA in a timely manner. Several hours elapsed before notification was received. The mine operator was aware of the requirements." The citation further specifies that there was no likelihood of injury or illness as a result of the violation, that no persons were affected, that the violation was not significant and substantial (S&S),[1] and that the violation was the result of the high negligence of the operator.

[1] The S&S terminology is taken from section 104(d)(1) of the Mine Act, which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a … mine safety or health hazard." 30 U.S.C. § 814(d)(1).

In support of the settlement motion, the CLR states that the "Secretary has determined that the violation was not subject to penalties defined in SECTION 5 of the MINER ACT of 2006." Sec'y Mot. at 1. As to the request to modify the negligence designated for the violation, the CLR states:

> Respondent asserts that the following constitute mitigating factors: The accident occurred at 01:03. On site management reviewed the reporting procedure and determined that the condition did not require immediate notification. Upon arrival at the mine site, senior management reviewed the condition and the Safety Manager called and notified MSHA at 07:30.

Id. at [1-2]. The CLR provides no further factual background.

In 2006, in response to the tragic accidents at the Sago Mine and Aracoma Alma No. 1 Mine, Congress enacted the the Mine Improvement and New Emergency Response Act of 2006, Pub. L. No. 109-236, 120 Stat. 493 ("MINER Act"). Section 103(j) of the Mine Act requires a mine operator to notify MSHA in the event of an accident occurring at its mine. 30 U.S.C. § 813(j). Section 5(a) of the MINER Act amended Mine Act section 103(j) such that "the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred." Section 5(b) of the MINER Act amended Mine Act section 110(a) by adding a new subsection providing that failure to meet the requirements of section 103(j) relating to the 15 minute requirement "shall be assessed a civil penalty . . . of not less than $5,000 and not more than $60,000." 30 U.S.C. § 820(a)(2).

The Secretary's regulation implementing the MINER Act amendments relating to the 15 minute requirement are less than a model of clarity. Section 50.10, the section under which the operator here was cited, provides:

> The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving:
>
> (a) A death of an individual at the mine;
>
> (b) An injury of an individual at the mine which has a reasonable potential to cause death;
>
> (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or
>
> (d) Any other accident.

30 C.F.R. § 50.10. Under the scant facts of this case which the CLR had provided me, the Secretary apparently reads this regulation to exempt "[a]ny other accident" from the 15 minute

requirement of section 5 of the MINER Act. This clearly is *not* what section 50.10 provides since nothing in the regulation exempts subsection (d) from the 15 minute requirement. Insofar as section 50.10 as promulgated conflicts with Mine Act section 103(j), I will defer to the Secretary's reading of her own regulation. "Any other accident" thus refers in section 50.10 to an accident that does not involve the death of an individual, or an injury or entrapment with "a reasonable potential to cause death," and is thus exempt from the 15 minute requirement.

Here, the accident at issue was that the mine "experienced a power outage affecting both hoists." Citation No. 6501298. The CLR, however, provides no facts upon which I could assess the likelihood of whether the power outage and hoist problems could have potentially led to an injury or entrapment with "a reasonable potential to cause death," which the Secretary presumably determined when she concluded that the operator violated section 50.10(d) rather than section 50.10(a). In the absence of any such facts, it is impossible for me to conclude that the Secretary had a reasonable basis for her determination.

Having considered the representations and documentation submitted in this case, and I therefore conclude that the proffered settlement lacks a sufficient evidentiary basis.

WHEREFORE, the motion for approval of settlement is **DENIED** without prejudice.

/s/ Robert J. Lesnick
Robert J. Lesnick
Chief Administrative Law Judge

Distribution:

Daniel J. Goyen, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 515 West First Street, Room 333, Duluth, MN 55802

William Shull, Representative of Miners, 414 Fifth St., Fairport, OH 44077

Richard Hickman, Safety Manager, Morton Salt International Inc., P.O. Box 428, Grand River, OH 44045

/tjr

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

January 18, 2012

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2011-189-M A.C. No. 33-04578-237996
v.	
ARCH MATERIALS LLC, Respondent	Mine: Batavia

ORDER ACCEPTING APPEARANCE
ORDER DENYING SETTLEMENT MOTION

Before: Judge Lesnick

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary of Labor's Conference and Litigation Representative ("CLR") filed a notice of limited appearance in this case. It is **ORDERED** that the CLR be accepted to represent the Secretary. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994). The CLR has filed a motion to approve settlement. A reduction in the penalty from $5,000.00 to $100.00 is proposed. The CLR also requests that Citation No. 6501538 be modified to specify that 30 C.F.R. § 50.10(d) was violated, rather than 30 C.F.R. § 50.10(a) as set forth in the citation.

Citation No. 6501538 states that, at 6:40 A.M. on September 20, 2010, an "unplanned" roof fall was discovered in Arch Materials' Batavia Mine the dimension of which were 200 feet long, 40 feet wide, and 8 feet thick. The roof fall was reported to MSHA that same day at approximately 8:00 A.M. The citation further specifies that there was no likelihood of injury or illness as a result of the violation, that no persons were affected, that the violation was not significant and substantial (S&S),[1] and that the violation was the result of the low negligence of the operator. In support of the settlement motion, the CLR states simply that he "determined that the violation was not subject to penalties defined in SECTION 5 of the MINER ACT of 2006." Proposed Order. The CLR provides no further factual background.

[1] The S&S terminology is taken from section 104(d)(1) of the Mine Act, which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a … mine safety or health hazard." 30 U.S.C. § 814(d)(1).

In 2006, in response to the tragic accidents at the Sago Mine and Aracoma Alma No. 1 Mine, Congress enacted the the Mine Improvement and New Emergency Response Act of 2006, Pub. L. No. 109-236, 120 Stat. 493 ("MINER Act"). Section 103(j) of the Mine Act requires a mine operator to notify MSHA in the event of an accident occurring at its mine. 30 U.S.C. § 813(j). Section 5(a) of the MINER Act amended Mine Act section 103(j) such that "the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred." Section 5(b) of the MINER Act amended Mine Act section 110(a) by adding a new subsection providing that failure to meet the requirements of section 103(j) relating to the 15 minute requirement "shall be assessed a civil penalty . . . of not less than $5,000 and not more than $60,000." 30 U.S.C. § 820(a)(2).

The Secretary's regulation implementing the MINER Act amendments relating to the 15 minute requirement are less than a model of clarity. Section 50.10, the section under which the operator here was cited, provides:

> The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving:
>
> (a) A death of an individual at the mine;
>
> (b) An injury of an individual at the mine which has a reasonable potential to cause death;
>
> (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or
>
> (d) Any other accident.

30 C.F.R. § 50.10. Under the scant facts of this case which the CLR had provided me, the Secretary apparently reads this regulation to exempt "[a]ny other accident" from the 15 minute requirement of section 5 of the MINER Act. This clearly is *not* what section 50.10 provides since nothing in the regulation exempts subsection (d) from the 15 minute requirement. Insofar as section 50.10 as promulgated conflicts with Mine Act section 103(j), I will defer to the Secretary's reading of her own regulation. "Any other accident" thus refers in section 50.10 to an accident that does not involve the death of an individual, or an injury or entrapment with "a reasonable potential to cause death," and is thus exempt from the 15 minute requirement.

Here, the accident at issue was a roof fall of mammoth and potentially lethal dimensions. The CLR, however, provides no facts upon which I could assess the likelihood of whether the roof fall could have potentially caused or led to an injury or entrapment with "a reasonable potential to cause death," which the CLR presumably determined when he concluded that the operator violated section 50.10(d) rather than section 50.10(a). In the absence of any such facts, it is impossible for me to conclude that the CLR had a reasonable basis for his determination.

Having considered the representations and documentation submitted in this case, and I therefore conclude that the proffered settlement lacks a sufficient evidentiary basis.

WHEREFORE, the motion for approval of settlement is **DENIED** without prejudice.

/s/ Robert J. Lesnick
Robert J. Lesnick
Chief Administrative Law Judge

Distribution:

Daniel J. Goyen, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 515 West First Street, Room 333, Duluth, MN 55802

Thomas Belville, Plant Manager, Arch Materials LLC, 4438 State Route 276, Batavia, OH 45103

/tjr

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

January 19, 2012

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-562
Petitioner	:	A.C. No. 15-18861-137278
v.	:	
	:	Docket No. KENT 2008-782
CONSHOR MINING, LLC,	:	A.C. No. 15-18861-143281
Respondent	:	
	:	Mine No. 1

CERTIFICATION OF INTERLOCUTORY RULING

Before: Judge Feldman

These matters present novel issues concerning the appropriate standard for imposing enhanced civil penalties under the flagrant violation provisions of section 110(b)(2) of the Federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006 ("Act," "Mine Act," or "New Miner Act"), 30 U.S.C. § 820(b)(2). Section 110(b)(2) became effective on August 17, 2006, following the Sago Mine disaster. Section 110(b)(2) provides:

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

30 U.S.C. § 820(b)(2).

The issue of the applicable evidentiary requirements to support a flagrant violation based upon a "reckless failure" to eliminate a known violation is currently before the Commission. *Stillhouse Mining, LLC*, 33 FMSHRC 778 (Mar. 2011) (ALJ), *PDR granted* May 6, 2011. These proceedings concern the novel question regarding the necessary evidentiary requirements to support a flagrant violation based on a "repeated failure" to eliminate a known violation.

The controlling issue addressed in the Order dated November 28, 2011, which is being certified for interlocutory review, is whether a violation not attributable to reckless conduct can be deemed flagrant under 30 U.S.C. § 820(b)(2) based on a history of similar violations. *Conshor Order*, 33 FMSHRC ___ (Nov. 2011) (ALJ), *slip op.* at 15. The Secretary seeks to impose an enhanced penalty for each of three alleged unwarrantable violations of section 75.220(a)(1), which governs roof control plans. The subject violative conditions are cited in 104(d)(2) Order Nos. 7502867 and 7502879 issued in May 2007 contained in Docket No. KENT 2008-562, and in Order No. 7503222 issued in June 2007 contained in Docket No. KENT 2008-782. In the 104(d) Orders, the alleged violations were attributable to a high degree of negligence, rather than reckless conduct. To elevate the gravity of the cited conditions beyond unwarrantable failure, the Secretary has advanced the proposition that the cited violations are flagrant based on Conshor Mining, LLC's ("Conshor's") history of similar unwarrantable violations.

The November 28, 2011, Order held that the Secretary's proffered interpretation of section 110(b)(2) with respect to a prior history of violations as a basis for a "repeated flagrant violation" could not be given effect because: (1) the Procedure Instruction Letter and News Release criteria for supporting a repeated flagrant violation are substantive rules that were not promulgated in accordance with the notice-and-comment provisions of section 553 of the Administrative Procedure Act, 5 U.S.C. § 553; (2) in *Berwind*, 21 FMSHRC 1284, 1317 (Dec. 1999), the Commission declined to extend *Chevron* deference to specific tests for charges brought by the Secretary; and, (3) notwithstanding *Berwind*, the Secretary's interpretation of section 110(b)(2) is not entitled to *Chevron* deference because the language of the section is unambiguous, and, alternatively because the Secretary's interpretation is arbitrary and unreasonable. *Id.*, *slip op.* at 3.

Rather the November 28, 2011, Order determined that a violation is flagrant if, based on the facts surrounding the violation, the violative condition is "conspicuously bad, offensive, or reprehensible," regardless of a mine operator's record of prior violations. *See The American Heritage Dictionary* 667 (4th ed. 2009). *Id.* at 12, 15. Namely, a violation is deemed to be flagrant if it is caused by egregious conduct underlying the cited condition as evidenced by a reckless or repeated failure *to eliminate a known violation that could substantially and proximately cause death* or serious injury. *Id.* at 15 (emphasis added).

The November 28, 2011, Order noted that although the terms "reckless" and "repeated" both describe underlying conduct that supports a flagrant violation charge, a repeated flagrant violation may evidence greater culpability warranting a higher enhanced civil penalty. *Id.* at 4. Examples of repeated flagrant conduct are conspicuous dangerous violative conditions that are either indifferently overlooked during a series of pre-shift and on-shift examinations, or, are reported and ignored. *Id.*

Consequently, the November 28, 2011, Order directed the Secretary to submit a prehearing statement addressing whether the particular facts surrounding the subject cited violations evidence, at a minimum, the requisite reckless conduct necessary to support flagrant designations, and if so, the basis for such allegations. The Secretary's December 20, 2011, prehearing statement averred that: (1) in Order No. 7502867 the preshift examiner knew or should have known that the last row of permanent roof support exceeded the maximum allowable distance of four feet from the face; (2) in Order No. 7502879 the operator was once again cited for a similar roof control condition, which had been cited six days earlier in another area of the mine, for the last row of permanent roof support exceeding the maximum allowable distance of four feet from the face; and, (3) in Order No. 7503222 the subject roof control condition concerned sloughage that allegedly was "obvious, extensive and developed over time." *Sec'y Resp.* at 1-4. Significantly, however, the Secretary's prehearing statement did not allege that the cited conditions were attributable to reckless conduct.

Conshor responded to the Secretary's prehearing order on January 9, 2012. Conshor argues that a "knew or should have known" standard with respect to a cited violation does not provide an adequate basis for a flagrant designation. *Conshor Resp*. at 2. Since the Secretary has not contended that the subject alleged violations were attributable to recklessness, Conshor asserts that, consistent with the November 28, 2011, Order, "the Secretary may not seek penalties for flagrant violations for Order Nos. 7502867, 7502879, and 7503222." *Id.* at 4. I construe Conshor's response as a Motion to Dismiss the flagrant violation designations.

Commission Rule 76(a)(1)(i) provides that a Judge may certify, upon his own motion, that his interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a)(1)(i). As noted, the question addressed in the November 28, 2011, Order, is whether a violation that is not attributable to reckless conduct can be deemed flagrant under 30 U.S.C. § 820(b)(2) based on prior similar violations. This issue presents a novel and controlling question of law that requires interlocutory resolution.

Resolution of this question will materially advance the final disposition of these proceedings. Rule 55 empowers a Judge to rule on offers of proof, receive relevant evidence, and hold conferences for the purposes of effectuating settlement or simplifying the issues. 29 C.F.R. § 2700.55. While the predicate violations in this case have become final, continued uncertainty regarding whether the relevant evidence should be limited to the facts surrounding the violation, or, include a history of violations, interferes with the Judge's ability to conduct and regulate the course of the hearing, or effectuate settlement.

Finally, the grant of interlocutory review would provide an expeditious method of resolving fundamental questions that impact other flagrant cases currently before the Commission.[1] [2]

ORDER

In view of the above, the November 28, 2011, Order addressing the standard for adjudicating violations deemed flagrant by the Secretary based on a history of similar violations is certified for interlocutory review pursuant to Commission Rule 76(a)(1)(i).

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution: (Electronic and Certified Mail)

Christian P. Barber, Esq., U.S. Department of Labor, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219

Jonathan R. Ellis, Esq., Steptoe & Johnson PLLC, P.O. Box 1588, Charleston, WV 25326-1588

/jel

[1] For example, in Docket Nos. LAKE 2008-666 and WEVA 2008-1265, pending before Judge Melick and Judge Barbour, respectively, the Secretary asserts that violations attributable to high negligence, rather than a reckless disregard, are properly deemed flagrant based on a history of similar violations.

[2] The position advanced by the Secretary elevates the significance of an unwarrantable failure. Immediate review may facilitate settlement negotiations in numerous pending cases involving alleged unwarrantable predicate violations. Without Commission direction, settlement of these "predicate violations" may be impeded if these violations can be used as the basis for enhanced civil penalties of as much as $220,000. Absent settlement, litigation of alleged flagrant violations based on prior conduct may require awaiting the Commission's final disposition of the alleged predicate violations.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9953 / FAX: 202-434-9949

January 20, 2012

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING:
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2008-1265
Petitioner,	:	A.C. No. 46-04168-000151760
	:	
	:	Mine: Sentinel
v.	:	
	:	
	:	
WOLF RUN MINING, CO.,	:	
Respondent.	:	

ORDER DENYING CROSS MOTIONS FOR PARTIAL SUMMARY DECISION AND NOTICE OF HEARING

In this civil penalty case arising under sections 105 and 110 (30 U.S.C. §§ 815, 820) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"or "Act") the Secretary of Labor ("Secretary") on behalf of her Mine Safety and Health Administration ("MSHA") petitions for the assessment of a civil penalty of $142,900 for an alleged violation of mandatory safety standard 30 C.F.R. § 75.400. The Secretary charges that the violation occurred on November 14, 2007, at the Sentinel Mine of Wolf Run Mining Co. ("Wolf Run"), an underground bituminous coal mine located in Barbour County, West Virginia. MSHA's inspector found that the violation was a significant and substantial contribution to a mine safety hazard ("S&S" violation) and was the result of the company's unwarrantable failure to comply with the standard. The inspector therefore cited the alleged violation in an order (Order No. 6605922) issued pursuant to section 104(d)(2) of the Mine Act. 30 U.S.C. § 104(d)(2).

When proposing a penalty for the alleged violation, the Secretary waived the regular assessment procedures and determined that a special assessment was warranted. *See* Petition, Exhibit A, Narrative Findings for a Special Assessment. The Secretary stated, "The violation was considered to be flagrant; that is, a reckless and repeated failure to make reasonable efforts to eliminate a known violation of a mandatory . . . safety standard that substantially and proximately caused, or reasonably could have been expected to cause death or a serious bodily

injury."[1] *Id.* Upon receipt of the Secretary's petition Wolf Run answered, admitting the Commission's jurisdiction but denying the alleged violation. Answer 1. The company also challenged the inspector's S&S and unwarrantable findings.

The case was assigned to the court, which ordered the parties to confer regarding the possibility of a settlement. When a settlement proved impossible, the Secretary moved to consolidate the subject case, Docket No. WEVA 2008-1265, with Docket No. WEVA 2009-420, another case involving Wolf Run. In addition, the Secretary asked that the cases, once consolidated, be stayed pending the decision of Commission Judge Jerold Feldman in *Wolf Run Mining Co.,* WEVA 2008-1816. The Secretary noted that one of the alleged violations in Docket No. WEVA 2008-1816 was Order No. 7101469, which charged an S&S and unwarrantable violation of section 75.400. The Secretary stated that, "When classifying Order No. 6605922 in WEVA 2008-1265 as a repeated failure flagrant violation, the Secretary based that determination, in part on the issuance of Order No. 7101469, which was issued under the same standard [section 75.400] for the same conditions in the same section of the mine several months prior." Mot. for Consol. and Stay 3. The Secretary noted that according to MSHA's procedures for evaluating repeated flagrant violations, the violations must meet the following criteria:

1. Citation or order is evaluated as [S&S],
2. Injury or illness is evaluated as at least permanently disabling,
3. Type of action is evaluated as unwarrantable failure,
4. At least two prior "unwarrantable failure"

---

[1] Section 110(b)(2) of the Mine Act as amended by the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act") became effective on August 17, 2006. Section 110(b)(2) increased the maximum civil penalty for extremely hazardous violations deemed "flagrant" by providing:

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the proceeding sentence the term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2).

> violations of the same . . . safety standard have been cited within the past 15 months.
>
> Mot. For Consol. and Stay 4 (*citing* MSHA Procedure Instruction Letter No. 108-III-02 ("PIL"), "Procedures for Evaluating Flagrant Violations" 2).

Asserting that it would be "necessary . . . to establish that Order No. 7101469 was properly issued and assessed as an unwarrantable failure violation under [section] 75.400 in order for the Secretary to satisfy the fourth criterion for a repeated failure flagrant classification of Order No. 6605922," the Secretary requested the consolidated cases be held in abeyance until Judge Feldman ruled on the validity of Order No. 7101469. Mot. For Consol. and Stay 4.

On April 26, 2010, and over the objection of Wolf Run, the court granted the Secretary's motion but allowed discovery to continue. The court stated, "It makes no sense to hear evidence on the issue of whether the alleged violation of section 75.400 in Order No. 6605922 is 'flagrant' before knowing whether the question is actually at issue." Consolidation of Proceedings 1. Subsequently, the Secretary and Wolf Run reached a settlement in which they in part agreed that Order No. 7101469 was S&S and unwarrantable. As a result, the stay was lifted and the captioned cases were noticed for hearing.

On March 11, 2011, the parties advised the court that the sole issue between them was whether Order No. 6605922 (Docket No. 2008-1265) was properly assessed as "flagrant" within the meaning of section 110(b)(2) of the Mine Act as amended by the MINER Act.[2] Counsels proposed that the issue be resolved through motions for partial summary decision, and the parties filed the motions.

THE MOTIONS

WOLF RUN

Wolf Run asserts that it was improper for the Secretary to assess the proposed penalty for the violation of section 75.400 alleged in Order No. 6605922 under the "flagrant violation" provision of the Mine Act. The company points to the fact that the Mine Act defines a "flagrant violation" as a "reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. §820(b)(1). The company notes that Order No. 6605922 does not allege that the violation of section 75.400 was the result of Wolf Run's "reckless disregard." Therefore, in determining that

[2] The parties were able to reduce the issues to the legitimacy of the flagrant designation because they fully settled Docket No. 2009-420. As a result, the Secretary filed a motion to approve the settlement, which the court granted on April 21, 2011.

the violation was "flagrant" the Secretary relied on fact that the violation is the alleged result of Wolf Run's "repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard" and her interpretation that a repeated violation includes a situation in which there have been, *inter alia*, "[a]t least two prior 'unwarrantable failure' violations of the same safety or health standard . . . cited within the past 15 months." PIL No. 106-III-04 and PIL NO. 108-III-02.[3] Therefore, relying on the PILs, the Secretary is asserting that the violation alleged in Order No. 6605922 is "flagrant" based on the fact that there were two prior unwarrantable violations of section 75.400 in the past 15 months. Wolf Run Mot. For Part. Sum. Dec. 5. The problem with this, according to the company, is that the two alleged unwarrantable violations "were not based upon the same conditions as alleged in Order No. 6605922." *Id.* Thus, they were not "repeated" violations within the meaning of section 110(b)(2). *Id.*

The company also challenges the Secretary's reliance on the criteria for establishing "flagrant" violations as set forth in its PILs. It asserts that the PILs were not promulgated properly pursuant to Section 101 of the Act and "cannot be the basis of a proposed assessment or otherwise utilized by the Secretary to support a "flagrant" designation." Mot. For Part. Sum. Dec. 5.

THE SECRETARY

The Secretary counters that there are no genuine issues of material fact between the parties and that the facts establish that the violation of section 75.400 cited in Order No. 6605922 (along with other violations of the standard) establish Wolf Run's "repeated . . . failure to make reasonable efforts to eliminate a known violation of a mandatory safety or health standard that . . . reasonably could have been expected to cause, death or serious bodily injury." Sec.'s Cross Mot. For Part. Sum Dec., *citing* 30 U.S.C. § Section 110(b)(2). The Secretary notes that on November 14, 2007, the inspector issued Order No. 6605922 to Wolf Run and the order cited the operator for "extensive accumulations of combustible loose coal, coal fines and float coal dust throughout the crosscuts and entries of the No. 1 . . . [s]ection of the Sentinel Mine." Sec's Mem. in Support of Her Cross Mot. 2. The Secretary states that the parties agree that the combustible material described in the order violated section 75.400. *Id.* 2, *citing* Sec.'s Stat't of Mat. Facts ("SMF") 4, 14. She also states that Wolf Run agrees that the violation resulted from the company's high negligence and unwarrantable failure and that it was reasonably likely to cause permanently disabling injuries to 10 persons. *Id.*, *citing* SMF 15-19. Finally, the Secretary asserts that Wolf Run agrees that the accumulations cited in Order No. 6605922 resulted from several shifts of neglect and that Wolf Run was on notice through previous conversations with MSHA that greater efforts were necessary for compliance. *Id.*, *citing* SMF 9, 10. Therefore,

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[3] The PILs have expired. PIL No. 106-III-04 expired on March 31, 2008 and PIL No. 108-III-02 expired on March 31, 2010. Nonetheless, the Secretary continues to advocate the same criteria for determining "repeated failure" violations. *See* MSHA News Release (April 9, 2011).

"The only remaining issue is whether [the] violation [of section 75.400] meets the criteria to be assessed as a 'flagrant violation' pursuant to [s]ection 110(b(2) of the Mine Act." *Id.* 3. In the Secretary's view the "uncontested facts fully support a decision that the statutory criteria for a flagrant violation are satisfied." *Id.* Therefore, Order No. 6605922 should be affirmed. *Id.*

At the core of the Secretary's "flagrant" assertion is her allegation that the violation of section 75.400 cited in Order No. 6605922 meets the "repeated failure" component of section 110(b)(2). The Secretary details her disagreement with the operator's interpretation of section 110(b)(2). It does not, she maintains, require that a violation can only be deemed "flagrant" if the violation is predicated on a failure to correct a previously issued citation. Sec.'s Mem. in Support of Her Cross Mot. 4-5. In this regard, she notes Commission Judge Alan Paez's statement in *Stillhouse Mining, LLC*, 33 FMSHRC 778 (March 2011), that "Given . . . Congress expressly omitted the requirement that section 110(b) involve a cited violation, the known violation at issue in a flagrant case need not have been previously cited by MSHA at the time the operator recklessly failed to eliminate it." Sec's Mem. In Support of her Cross Mot. 6, *quoting* 33 FMSHRC at 897. The Secretary also asserts that Wolf Run " had repeatedly encountered dangerous accumulations in the sections, crosscuts and entries of the . . .[coal] seam [that it was mining], and had repeatedly failed to remove them." *Id.* Therefore, the violation cited in Order No. 6605922 may be assess as flagrant under Section 110(b)(2). *Id.*

The Secretary further argues that her interpretation of section 110(b)(2) is entitled to deference under either a *Chevron I* or *Chevron II* analysis. Sec's Mem. in Support of Her Cross Mot. 7-8. Moreover, she argues that she did not engage in improper rule-making via the PILs. *Id.*

ANALYSIS

Despite the numerous arguments, the issues are relatively simple. The matter is before the court because the Secretary has filed a petition seeking a civil penalty for an alleged violation of section 75.400. In general, under the statutory scheme, it is the Secretary who proposes the penalty, and if the Secretary establishes that a violation occurred, the judge is required to assess a penalty taking account of the civil penalty criteria of section 110(i) of the Act as well as any other applicable statutory penalty requirements or limitations. The judge's assessment must be *de novo* and based on the facts established at trial or as otherwise agreed upon by the parties. Once findings on the statutory criteria have been made, a judge's penalty assessment is an exercise of discretion. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292- 294 (May 1983); *Canera Green*, 22 FMSHRC 616, 620 (May 2000). Should the judge's assessment substantially diverge from the penalty initially proposed by the Secretary, the Commission requires the judge to provide a sufficient explanation of the bases underlying his or her assessment. *Sellersburg*, 5 FMSHRC at 293.

In this case the Secretary has proposed the assessment of a civil penalty of $142,900 for a violation of section 75.400, a violation that according to the Secretary is "considered serious," that "resulted from [Wolf Run's] high degree of negligence" and that is "considered to be flagrant." *Narrative Findings for Special Assessment*. The Secretary explains in her narrative

findings that she considers the violation to be flagrant because she believes it was the result of "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory . . . safety standard that . . . reasonably could have been expected to cause, death or serious bodily injury." *Id.*

Given that the parties have filed cross motions for partial summary decision, the court must look at the agreed upon facts and conclude whether they establish the existence of the violation. If so, a penalty is required and the court must determine its proper amount. In determining the penalty amount, the court must make and apply findings regarding the statutory civil penalty criteria. Further, in view of the Secretary's "flagrant" allegation, the court must determine whether the violation was in fact flagrant, as that word is defined in section 110(b)(2), that is whether as the Secretary asserts the violation was the result of "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially or proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. 820(b)(2). Put another way, the primary issue before the court is whether the agreed upon facts are adequate to allow the court to find that the alleged violation occurred and if so, whether the facts allow the court to assess the civil penalty sought by the Secretary.[4]

Determining the existence of a violation and making findings regarding the relevant civil penalty criteria are exercises in which the court has engaged innumerable times. On the other hand, finding whether the violation was in fact flagrant as charged by the Secretary is an exercise new to the court and one that has been undertaken previously by few of the Commission's judges. Although there is a paucity of precedent, the court has meaningful guidance. It is aware of both the decision of Commission Judge Alan Paez in *Stillhouse Mining, LLC,* 33 FMSHRC 778 (March 2011), and the order of Commission Judge Jerold Feldman in *Conshor Mining*, *LLC*, 34 FMSHRC __, Kent 2008-562, etc. (Nov. 28, 2011) (Order).[5] In their rulings Judges Paez and Feldman parsed with care the language of the statutory definition of "flagrant," examined the meaning of the definition's words and tested the meaning within the context of the purpose of section 110(b)(2). Given their efforts the court sees no reason to reinvent the wheel, and the court will resolve the issues before it with an eye to the judges' holdings.

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[4] The issue of how the Secretary determined to charge the company with a flagrant violation and thus propose a penalty of $142,900 for a single violation is not one that the court must consider. The question is not how the case reached the court, but whether given the facts as they stand at this point the Secretary has established that the violation of section 75.400 cited in Order No. 6605922 was in fact "flagrant" within the meaning of section 110(b)(2) of the Act. For this reason the court views as irrelevant the parties' arguments regarding the legitimacy of the PILs.

[5] Judge Feldman's order has been certified to the Commission for interlocutory review. *Conshor Mining, LLC. 34 FMSHRC_ (Certification of Interlocutory Ruling) (January 19, 2012).*

As the court has already noted, it views the primary issue before it as whether or not, given facts as they presently stand, it can find that the violation occurred, and if so, whether it can assess a civil penalty based on the statutory penalty criteria and the Secretary's flagrant designation. Therefore, when ruling on the cross motions for partial summary decision, the court will first make a finding regarding the existence of the violation. Assuming it concludes that the facts establish the violation, the court will turn to the civil penalty criteria and to the Secretary's S&S and unwarrantable allegations. Finally, the court will address whether the facts establish a flagrant violation. If the necessary predicate findings can be made, the court will then assess the penalty that it deems appropriate in view of the civil penalty criteria, the flagrant designation, and the deterrent purposes of the Act.

THE VIOLATION

The parties have stipulated to "the facts set forth in Section 8 of . . . Order 6605922." *Letter of Joanne Jarquin to The Court* (March 16, 2011), Stip. 1. The court accepts the stipulation. Section 8 of the order states in part:

> Combustible material in the form of fine coal, loose coal, and float coal dust was deposited and allowed to accumulate on the mine floor of the [No.] 1, 001-0 MMU section at the following locations[:] 1.) The [No.] 1 thru [No.] 8 connecting crosscuts and extending from the feeder to the working faces. These dry[,] black accumulations ranged from 6" to 19" deep, 3-4 feet wide in the center of the entry and 1-2 feet along the rib lines. 2.) The [No.] 2 and [No.] 3 entries and connecting cross-cuts of the Left Intake from spad [No.] 724 in [No.] 2 entry and inby spad [No.] 812 in [No.] 3 entry extending inby to the section feeder. These powder-dry reddish accumulations were from 3-4 feet wide in the center of the entry and were suspended into the air when traveling though this area and carried to the working face. 3.) [No.] 6 entry from spad [No.] 910 inby to 11 block. These dry black accumulations measured up to 15 inches deep, extending 1-2 feet from each rib for the entire length of the entry. This section has entries and cross-cuts on 76' centers. The combined accumulations including connecting cross-cuts covers over 4,268 feet.

Order No.6605922; 605922-01.

As the parties agree, the conditions described in the order clearly violate section 75.400 which requires in part that "[c]oal dust, including float coal dust . . . [and] loose coal . . . shall be

cleaned up and not be permitted to accumulate[.]" The violation existed as charged.

THE CIVIL PENALTY CRITERIA

Having found the violation, the court looks to the statutory civil penalty criteria. With regard to negligence, the parties have stipulated that the violation was due to Wolf Run's "high" negligence. *Letter of Joanne Jarquin to the Court* (March 16, 2011), Stip 1. The court accepts the stipulation and finds that Wolf Run's negligence was indeed high.

With regard to gravity, they have stipulated that the violation was reasonably likely to result in permanently disabling injuries to 10 persons. *Letter of Joanne Jarquin to the Court* (March 16, 2011), Stip 1. The court accepts the stipulation and finds that the violation was indeed serious.

The parties also have stipulated that the order in which the violation is alleged was "properly issued as a [s]ection 104(d)(2) S&S Order." *Letter of Joanne Jarquin to the Court* (March 16, 2011), Stip.1. The court interprets this as an agreement that the inspector's S&S and unwarrantable failure findings are valid, and the court so finds.

The parties have not stipulated to four of the civil penalty criteria. Rather, they have informed the court that they have "reached stipulations regarding the penalty amount that should be assessed . . . depending on the outcome of the motions for partial summary decision." *Letter Joanne Jarquin to the Court* (March 16, 2011), Stip 3. While the parties are free to suggest a penalty they deem appropriate in light of the civil penalty criteria and the court's resolution of the "flagrant" issue, it is the court that must ultimately determine the amount of the penalty. It cannot do so based on the parties' motion for partial summary decision without the parties agreeing on the other civil penalty criteria. Therefore, the parties shall provide the court with stipulations regarding Wolf Run's applicable history of previous violations, the size of Wolf Run, the effect of any penalty assessed on Wolf Run's ability to continue in business, and the good faith of Wolf Run in attempting to rapidly abate the violation of section 75.400. 30 U.S.C. §820(I). When they do so they also may advise the court of the penalty they deem appropriate for the violation.[6]

THE FLAGRANT NATURE OF THE VIOLATION

The remaining issue before the court is whether Wolf Run's violation of section 75.400 was "flagrant." As Judge Paez noted in *Stillwater*, based on the language of the statute, there are four elements that comprise a flagrant violation:

[6] If the parties are not able to stipulate as to these criteria, they should be prepared to present evidence on them at the hearing scheduled later in this order.

(1) Reckless or repeated failure to make reasonable efforts to eliminate

(2) A known violation of a mandatory health or safety standard

(3) (a) That substantially or proximately caused or

(b) Reasonably could have been expected to cause

(4) Death or serious bodily injury.

Stillhouse, 33 FMSHRC at 802.

WOLF RUN'S REPEATED FAILURE

The Secretary is not charging that the violation of section 75.400 was caused by Wolf Run's recklessness. Rather, it is the company's "repeated failure to make reasonable efforts to eliminate" violations of section 75.400 that is the basis for the Secretary's "flagrant" designation. Sec's Cross Mot. For Part. Sum. Dec. 13. The court concludes, however, that based on the record as it now stands the court is unable to determine the propriety of the Secretary's designation. The problem is that the Secretary's interpretation of "repeated failure" does not comport with the Act. As Judge Feldman pointed out, "A repeated flagrant violation requires both knowledge of the violation and a repeated failure to eliminate it." *Conshor Mining, LLC,* at 11. Giving the words of the statute a straightforward (and the court believes a proper) reading, Judge Feldman found that "the phrase 'repeated failure' when read in context refers to current repeated conduct evidenced by a failure to eliminate the hazard posed by the discrete violation alleged to be flagrant, rather than [by] a past history of violations." *Id.* 12. The court agrees with Judge Feldman that "[r]elying on a violation history as a required element of a repeated flagrant violation . . . superimpose[s] an additional test that is not articulated in the statute." *Id.* Judge Feldman reasoned that in enacting section 110(b)(2) of the Act, Congress focused on the consequences of a repeated failure to eliminate an extremely hazardous violation, rather than on a history of past violations as the basis for a flagrant designation. *See e.g.*, *Conshor* at 13. Judge Feldman's reasoning is sound and the court, whose duty it is to interpret section 110(b) (2) as written not as how the Secretary wishes it had been written, sees no reason to depart from it.[7]

It is therefore the view of the court that to prove her "flagrant" allegation, the Secretary must not only establish that the violation of section 75.400 at issue could reasonably have been expected to cause death or seriously bodily harm (something which Wolf Run appears prepared

[7] The court also fully agrees with Judge Feldman that "because the language of . . . section [110 (b)(2)] is unambiguous," the Secretary's interpretation of the section is not entitled to *Chevron* deference. *Conshor (Certification) at 2*.

to concede) but also that Wolf Run "repeated[ly] failed to make reasonable efforts to eliminate" [section 110(b)(2)] the "combustible material in the form of fine coal, loose coal, and float coal dust" cited in Order No. 6605922 that accumulated underground in the mine's active workings. In other words, the Secretary must show that Wolf Run repeatedly failed to make reasonable efforts to eliminate the violation of section 75.400 charged in the order.

Assuming the Secretary can establish that Wolf Run repeatedly failed to eliminate the violation of section 75.400 charged in the order, Wolf Run can rebut the "flagrant" allegation by established that although its efforts proved unsuccessful, they were reasonable.

THE STIPULATIONS AND THE NECESSARY PROOF

Having reviewed the cross motions, the stipulations and the parties other submissions, the court finds that the question of whether or not Wolf Run repeatedly failed to eliminate the particular violation of section 75.400 cited in the subject order cannot yet be answered. The issue is fact-intensive and testimony concerning the cited conditions and the commissions or omissions of Wolf Run will determine the result.

For these reason, the cross motions for partial summary decision are **DENIED**. The parties are advised that the matter will be called for hearing on Tuesday, April 17, 2012, at 8:30 a.m., in Charleston, West Virginia. Since the parties agree on the existence of the violation, its gravity, the negligence of Wolf Run in allowing the violation to exist, the violation's S&S nature and Wolf Run's unwarrantable failure, the parties will be expected to present evidence or an agreed upon stipulation regarding each of the civil penalty criteria for which no stipulation has yet been offered (applicable history of prior violations, size of business of Wolf Run, the effect of any penalty on Wolf Run's ability to continue in business, the good faith of Wolf Run in attempting to achieve rapid compliance after the violation was cited). Further, to prove her allegation that the agreed upon violation of section 75.400 was "flagrant", the Secretary should be prepared to present evidence regarding Wolf Run's "repeated failure to make reasonable efforts to eliminate" the specific violation of section 75.400 cited in Order No. 605922. As Judge Paez stated, the court will then look at "all of the facts and circumstances surrounding the [cited] violation" and determine whether or not Wolf Run failed to "take the steps a reasonable prudent operator would have taken to eliminate the known violation of" section 75.400. *Stillhouse Mining*, 33 FMSHRC at 805.

The Secretary will also need to show that Wolf Run knew of the violation, and I agree with Judge Feldman that she can do so either thorough evidence showing Wolf Run's actual knowledge or through evidence showing there were facts available to Wolf Run that would have provided a reasonable person with knowledge of the violation and its continued existence. *Conshor Mining* at 11. Finally, as Judge Feldman stated, Secretary must show that the cited violation of section 75.400 was "egregious," that is was "outrageously bad." *Id.* 12 (*quoting The American Heritage Dictionary* 667 (4th ed. 2009). For it's part, Wolf Run will be at liberty to dispute such evidence and to offer its own evidence regarding its knowledge of the cited condition, its efforts to eliminate the condition and the violation's allegedly egregious nature.

/s/ David Barbour
David Barbour
Administrative Law Judge
(202) 434-9953

Distribution: (1st Class U.S. Mail)

Linda Henry, Esq.; Joanne Jarquin, Esq., Department of Labor, Office of the Regional Solicitor, The Curtis Center, Suite 630 East, 170 S. Independence Mall West, Philadelphia, PA 1910

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1340, 401 Liberty Ave., Pittsburgh, PA 152222